Supreme Court, U.S.
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92-1554

NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1992

CAROL JESSEN HINTZ, et al.,

Petitioner,

against

PARK COUNTY, MONTANA, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JOSEPH P. HENNESSEY
HENNESSEY LAW OFFICE
1643 Lewis Avenue,
Suite 5
Billings, MT 59102

GEORGE T. RADOVICH
RADOVICH LAW FIRM
926 Main Street,
Suite 9
Billings, MT 59105

Counsel for Petitioner

QUESTIONS PRESENTED

1) This Petition for Writ of Certiorari is requested under Rule 10(a) & (c) of the Rules of the Supreme Court of the United States. The Opinion of the United States Court of Appeal of the Ninth Circuit is contrary to previous rulings of the United States Supreme Court in the following cases:

a) Dick v. New York Life Ins. Co., 359 U.S. 437, 79 S.Ct. 921, 3 L.Ed.2d. 935 (1959);

b) Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d. 202 (1986);

c) Bretz v. Kelman, 773 F.2d 1026 (9th Cir., (1985);

d) Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d. 265 (1986);

e) Hopkins v. Andaya, 958 F.2d 881 (9th Cir., 1992).

2) What constitutes an arrest and when is a party deemed to be in custody of the arresting officers? The Ninth Circuit Court of Appeals erred in ruling that John Hintz, a passenger in a motor vehicle was not in custody. Under the facts before the Court and the ruling of the Court in Hopkins v. Andaya, 958 F.2 881 (9th Cir., 1992), John Hintz and the driver of the vehicle in which he was riding, were certainly in custody of the officers.

3) The lower court and the appellate court indulged in the presumption that John Hintz had committed suicide. There is nothing in the record to support this presumption and in doing so the appellate court disregarded a previous ruling of the United States Supreme Court in Dick v. New York Life Ins. Co., 359 U.S. 437, 79 S.Ct. 921, 3 L.Ed.2d. 935 (1959)

and the Montana Supreme Court in Lewis v. New York Life Ins. Co., 113 Mont. 151, 124 P.2d 579 (1942).

4) The appellate court has misapplied United Mine Workers of America v. Gibbs, 383 U.S. 715, 86 S.Ct. 1130 (1966) in ruling that the trial court had the discretion to dismiss all state claims.

PARTIES DISCLOSURE STATEMENT

Carol Jessen Hintz, et al., Petitioner, furnishes the following list in accordance with the Rules of the Supreme Court of the United States Rule 14.1(b):

Carol Jessen Hintz, Personal Representative of the Estate of John Hintz, and Carol Jessen Hintz in her own behalf; and

Park County, Montana; Robert Oakland, individually and as former Sheriff of Park County, Montana; Dennis Frawley, individually and as former undersheriff and Deputy Sheriff of Park County, Montana; Lee Roy Keto, individually and as former Deputy Sheriff of Park County, Montana; Brad Wilson, individually and as former Deputy Sheriff of Park County, Montana; and Hank Tashjian, individually and as Deputy Sheriff of Park County, Montana.

INDEX

TABLE OF CONTENTS

Page

Questions Presented.....i

Parties Disclosure Statement.....iv

Opinions Below.....2

Jurisdiction.....3

Statutes Involved.....3

Statement of the Case.....4

Reasons for Granting the Writ.....8

Conclusion.....24

Appendix.....25

Exhibit "A": In the United States District Court, For the District of Montana, Billings Division:

Memorandum & Order.....22

Order.....40

In the United States Court of Appeals, For the Ninth Circuit:

Memorandum.....43

Order.....50

EXHIBIT "B"

Exhibit "B"
Page

Hopkins v. Andaya, 958 F.2d 881
(9th Cir. 1992).....1

Celotex Corp. v. Catrett, 106 S.Ct.
2548 (1986), 477 U.S. 317, 91 L.Ed.2d
265.....35

"B"

INDEX

CASES CITED

Page

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).....i, 9, 10, 21

Bretz v. Kelman, 773 F.2d 1026 (9th Cir. 1985).....i

Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548 (1986), 91 L.Ed.2d 265.....i, 21

Dick v. New York Life Ins. Co., 359 U.S. 437, 79 S.Ct. 921, 3 L.Ed.2d. 935 (1959).....i, ii, 22, 23

Graham v. Connor, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d. 443 (1989).....20

Hopkins v. Andaya, 958 F.2d 881 (9th Cir. 1992).....i, 19

Kaiser Cement Corp. v. Fischbach & Moore, Inc., 793 F.2d 1100 (9th Cir.) cert. denied, 479 U.S. 949 (1986).....21

Lewis v. New York Life Ins. Co., 113 Mont. 151, 124 P.2d 579 (1942).....iii

Matsushita Electrical Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).....21

T.W. Electrical Service, Inc. v. Pacific Electrical Contractors Ass'n, 809 F.2d 626 (9th Cir. 1987).....21

United Mine Workers of America v. Gibbs, 383 U.S. 715, 86 S.Ct. 1130 (1966).....iii

STATUTES CITED

Rule 301, Federal Rules of Evidence.....4

Rule 10.1(a) and (c), Supreme Court Rules.....3

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No. _____

CAROL JESSEN HINTZ, et al.,

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PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the decision and order of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on September 23, 1992. Order Denying Petition for Rehearing entered on December 16, 1992.

OPINIONS BELOW

The Memorandum Opinion and Order for dismissal of the District Court of the District of Montana, Billings Division dated January 23, 1991 holding that the Respondents' Motion for Summary Judgment is granted on Petitioner's claims under 42 U.S.C. Section 1983 and 1988 and that Petitioner's pendent state claims under Montana law are dismissed, is found in Appendix Exhibit "A". The Order of April 2, 1991 of the District Court of the District of Montana, Billings Division holding that Petitioner's Motion for Reconsideration is denied, is found in Appendix Exhibit "A". The Opinion of the Ninth Circuit Court of Appeals dated September 23, 1992, affirming the judgment of the District Court is found in Appendix Exhibit "A". The Circuit Court of Appeals Order filed December 16, 1992 denying Petition for Rehearing is found in Appendix

Exhibit "A".

JURISDICTION

The order and decision of denial of Petition for Rehearing by the United States Court of Appeals for the Ninth Circuit was entered on December 16, 1992. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

Rule 10.1(a) and (c) of the Supreme Court Rules provides:

> .1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> (a) When a United States court of appeals has rendered a decision in conflict with the decision of another

> United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision....
>
> ...(c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court....

Rule 301 of the Federal Rules of Evidence provides:

> In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

STATEMENT OF THE CASE

This case involves an action brought by

the Petitioner Carol Jessen Hintz, who is the widow of the deceased, John Hintz, who sustained a fatal gunshot wound while in the custody of the Park County, Montana Sheriff's Department. This action has been brought against Respondents Park County, Montana; Robert Oakland, former sheriff; Dennis Frawley, former undersheriff; Lee Roy Keto, former sheriff's deputy; Brad Wilson, former sheriff's deputy; and Hank Tashjian, deputy sheriff. This action has been brought against the above-named Respondents in their capacity as officers as well as against them individually.

This action alleges that the Respondents' actions in regard to John Hintz, deceased, were arbitrary and excessive unjustified force was used in attempting to serve "alleged" civil papers on John Hintz. Respondents' actions were in violation of John Hintz's

rights secured to him by the Fourth, Fifth and Fourteenth Amendments of the United States Constitution and his rights under 42 U.S.C. Section 1983. This action also involves allegations that the Respondents' actions against John Hintz included assault and battery, intentional infliction of emotional distress, intentional infliction of physical injury and gross negligence.

This case was filed in the United States District Court for the District of Montana, Helena Division, on April 7, 1989 by the Petitioner Carol Jessen Hintz against Respondents Park County, Montana; Robert Oakland; Dennis Frawley; Lee Roy Keto; Brad Wilson; and Hank Tashjian. On June 22, 1989 Respondents answered the Complaint. On August 3, 1989 the case was moved from the Helena Division to the Billings Division under the Order of James F. Battin, then Senior Judge.

Discovery, including depositions of the officers, Petitioner, and witness Wad Sarrazin and interrogatories, was completed in this case and Respondents' filed a motion for summary judgment on August 10, 1990. Petitioner filed a Brief in Opposition to Motion for Summary Judgment on August 27, 1990. A hearing on the motion was held on October 9, 1990 and Judge Battin issued his order of Janaury 23, 1991 granting the Respondents' motion for summary judgment, presuming in his Order that John Hintz had committed suicide. Petitioner filed a motion for reconsideration and a hearing was held on March 29, 1991 with Judge Battin denying the motion in his Order of April 2, 1991.

The notice of appeal was filed in this case in the Ninth Circuit Court of Appeals on April 24, 1991. The Petitioner's brief was filed on August 9, 1991 with the Respondents'

brief filed on September 9, 1991. The Petitioner filed a reply brief on September 20, 1991.

The hearing before the Ninth Circuit Court of Appeals, set in Seattle, Washington was held on September 18, 1992.

The Ninth Circuit Court by Judges Wright, Fletcher and Canby rendered their Opinion on September 23, 1992.

Petitioner filed a Petition for Rehearing on October 2, 1992, with an Order Denying Petition for Rehearing filed on December 16, 1992. Judgment was entered on January 7, 1993.

REASONS FOR GRANTING THE WRIT

To sanction the trial court and the appellate court in this case, it is necessary to give credence to two presumptions; (1) That Hintz committed suicide and (2) that prior to the shooting, the vehicle in which Hintz was a

passenger, had not been stopped by the police officers in question.

Any jury would find these presumptions completely untenable under the facts of this case. There is absolutely no testimony in this record that Hintz shot himself.

What constitutes an arrest and when is a party in custody? The Court of Appeals held:

"He also could have avoided the deputies by continuing to drive on the main raod, or even passing them on the dirt road."

All reasonable doubt as to the existence of genuine issues of material fact must be resolved against the moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). The opinion of the appellate court in sustaining the lower court is contrary to the holding in Anderson in the United States Supreme Court.

A brief review of the testimony of the

witnesses by deposition show that Anderson has not been complied with.

"Q. At what point did you turn your lights on to stop them, the rotating lights?

A. As soon as I felt the appropriate distance which would have been 100 yards or so from the intersection so they would have ample time to pull off there.

Q. Had he put his turn signal on before that?

A. No, he hadn't. Not prior to my top lights going I don't believe.

Q. You put on the lights then he put on the turn signals?

A. I believe so...

....Q. And how fast was the vehicle going when it made the turn onto the Old Clyde Park Road?

A. Not any excessive speed. At that time it was nothing abnormal for a normal traffic

stop, like he was just going to pull over and stop.

Q. The Old Clyde Park Road is a gravel road?

A. Yes, sir....

....Q. At what point did you shine your spotlight in his back window?

A. Shortly after I turned my top lights on.

Q. That was sometime before he made that turn?

A. Yes."

DEPOSITION OF HANK TASHJIAN; Page 12, line 20 through Page 14, line 7.

"Q. Did the Sarrazin vehicle then slow down and come to a stop?

A. The Sarrazin vehicle was maintaining a fairly high rate of speed but I couldn't tell you for sure. Sergeant Tashjian turned his top

lights on approximately 300 yards from us -- 400, 200, I couldn't tell you specifically. And at that time Deputy Keto turned our rotating lights on on our vehicle.

Q. At the time that happened, you were already outside of the vehicle?

A. Yes, I was....

....Q. And if they wanted to make the turn and didn't want to make the stop, they could have gone around your vehicle and kept going?

A. They could have made it through there, yes, by miracle if they were real good drivers through the bottom of the barrow pit on up, yes,they could have made it.

Q. I understand you left enough room for the vehicle to pass?

A. We sure did. Anybody going at a fair rate of speed could have easily made it around our vehicle.

Q. Then why did it take the manuevering

you just--I guess I lost something. Why did it take the maneuevering for them to go through the barrow pit to get around you?

A. No, I said we left an avenue of escape and if they would have proceeded through, they would have had to go through part of the barrow pit and then up around our vehicle there. There was enough room that you could make it by but you would have to do some driving....

Q....You blocked more than half of the road with your vehicle?

A. About half the road is all.

Q. And the road is wide enough two vehicles can pass?

A. Barely.

Q. So at the time both sets of lights were put on, you were to the left rear of your vehicle?

A. Yes.

Q. At that time were you armed?

A. I don't believe -- I was armed, yes.

DEPOSITION OF BRAD WILSON: Page 18 lin through Page 20, line 5.

"Q. As I understand the series of eve you just described, the pickup made the cor and began to slow down; is that right?

A. As it turned off, we turned the lights on and it started to slow down, righ

Q. Officer Wilson got out on right-hand side of the vehicle?

A. Yep."

DEPOSITION OF LEE ROY KETO; Page 17, l 19 through Page 18, line 1.

"Q. Can you describe for me the way it told to you, the circumstances of the stop.

A. Basically, that Hank Tashjian behind the vehicle. They had observed

prior to that, and I don't recall just exactly what they said on that. The Wilson/Keto vehicle was there (indicating), and they had, you know, stopped him there, which is the appropriate way to do it.

Q. The Tashjian vehicle was following the Sarrazin vehicle?

A. It was at that particular point, yeah.

Q. At the point of the intersection of the Old Clyde Park Road and Highway 89?

A. Right. It had its top lights on, and so did this vehicle here (indicating), have it top lights on.

Q. Referring to the Wilson vehicle?

A. Right.

Q. Both vehicles had the top lights on at the time the shot occurred; is that what you were told?

A. I believe that would be correct, yes."

DEPOSITION OF DENNIS FRAWLEY; Page 31,

line 4 through 22.

"Q. When you saw the Deputy following you on the road prior to the stop, you were then on Highway 89 approaching the turnoff that would take you to John's house?

A. Yes.

Q. And did you intend to turn on that road and go straight to John's house?

A. Yes.

Q. Did you have a conversation with John at that time?

A. Just asked him what he wanted me to do, if he wanted me to go straight or turn, and he said turn.

Q. Were there any oncoming vehicles on '89?

A. Not that we could see.

Q. Aside from the Deputy who was following you, did you see any other deputies?

A. Not till we got right there and the lights came on right at the road there.

Q. You didn't see the other Deputies' car until the lights came on?

A. Yes.

Q. And did both cars turn on their lights about the same time?

A. Yes....

....Q. Did you ever see John throw that gun out the window?

A. No.

Q. Aside from not having seen it, is there any other way you know if he did or didn't of your own knowledge?

A. No.

Q. Now you said that there was a shot fired and you weren't sure if John was inside or outside the vehicle when the shot was fired; is that correct?

A. I don't know if we were stopped or

still moving when the shot was fired.

Q. Was John inside or outside the vehicle?

A. I can't remember....

....Q. So you don't know if the shot was fired while John was in the car or outside of the car?

A. No....

....Q. Okay. I assume that you weren't looking at him when the shot was fired?

A. No.

Q. You were not looking at him when the shot was fired?

A. Yeah, I wasn't looking at him.

Q. Did you see him exit the vehicle?

A. No."

DEPOSITION OF WADE SARRAZIN; Page 14, line 21 through Page 18, line 17.

It is apparent from the foregoing extracts of testimony that the appellate court's conclusion that the driver of the truck in

which John Hintz was riding could have avoided the deputies is not accurate. The appellate court's opinion at page 3 states "The deputies had not arrested him or placed him in custody. He also could have avoided the deputies by continuing to drive on the main road, or even passing them on the dirt road."

We have 3 to 5 police cars out on a county road to serve a Justice Court Warrant.

The ruling by the Ninth Circuit Court of Appeals is contrary to their own ruling in Hopkins v. Andaya, 958 F.2d 881 (9th Cir. 1992) at 885:

"...In determining whether an officer acted reasonably under the Fourth Amendment, we must consider the "severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by

flight." Id., 490 U.S. at 396, 109 S.Ct. at 1872. (citing Graham v. Connor, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d. 443 (1989))."

Under the testimony of the defendant police officers set forth above and all the applicable law a motion for summary judgment, which was premature, should not have been granted by the trial court or sustained by the appellate court.

An apparent conflict exists with other decisions of the appellate court which were not addressed in their opinion.

We respectfully submit that in its opinion, the appellate court has overlooked its own rulings on what must be shown before a motion for summary judgment can be granted on Rule 56(c) of the Federal Rules of Civil Procedure. It is incumbent upon the moving party to establish an absence of material fact before he can be granted a judgment as a

matter of law. If there is any material fact, then summary judgment can not be granted. See T.W. Electrical Service, Inc. v. Pacific Electrical Contractors Ass'n., 809 F.2d 626, 630 (9th Cir. 1987).

This record clearly shows that there are many genuine issues for trial. Kaiser Cement Corp. v. Fischbach & Moore, Inc., 793 F.2d 1100 (9th Cir.) cert. denied, 479 U.S. 949 (1986). All reasonable doubt as to the existence of genuine issues of material fact must be resolved against the moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

If a rational trier of fact might resolve disputes raised during summary judgment proceedings in favor of the nonmoving party, summary judgment must be denied. Matsushita Electrical Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986). See also Celotex Corp. v.

Catrett, 477 U.S. 317, 106 S.Ct.2548 (1986), 91 L.Ed.2d 265.

The Appellate Court's dismissal of the holding in Dick v. New York Life Ins. Co., 359 U.S. 437, 79 S.Ct. 921, 3 L.Ed.2d. 935 (1959) is not a true interpretion of the law. Rule 301 of the Federal Rules of Evidence states as follows:

"Presumptions in General in Civil Actions and Proceedings. In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally

cast."

In Notes of Committee on the Judiciary, House Report No. 93-650, the intent of Rule 301 and particularly the United States Supreme Court ruling in Dick v. New York Life Ins. Co. is discussed:

"Any doubt as to the constitutional permissibility of a presumption imposing a burden of persuasion of the non-existence of the presumed fact in civil cases is laid at rest by Dick v. New York Life Ins. Co., 359 U.S. 437, 79 S.Ct. 921, 3 L.Ed.2d. 935 (1959)....

"Proof of coverage and of death by gunshot wound shifts the burden to the insurer to establish that the death of the insured was due to his suicide. 359 U.S. at 443, 79 S.Ct. at 925."

We submit to the Court that this is not confined only to insurance policies but was

intended to cover all civil actions and proceedings.

CONCLUSION

As was indicated by the Biden Committee several years ago, federal courts should protect the rights of all of the parties.

There are numerous unanswered questions of material fact for a jury in this case.

We respectfully submit Certiorari should issue.

Respectfully submitted,

JOSEPH P. HENNESSEY
HENNESSEY LAW OFFICE
1643 Lewis Avenue, #5
Billings, MT 59102

GEORGE T. RADOVICH
RADOVICH LAW FIRM
926 Main Street, #9
Billings, MT 59105

BY _____
JOSEPH P. HENNESSEY

A P P E N D I X

EXHIBIT "A"

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

BILLINGS DIVISION

CAROL JESSEN HINTZ, et al.,	)	
	)	
Plaintiffs,	)	CV 89-185-BLG-JFB
	)	
vs.	)	
	)	
PARK COUNTY, MONTANA, et al.,	)	MEMORANDUM AND ORDER
	)	
Defendants.	)	

On December 12, 1990 this Court granted defendants' Motion for Summary Judgment in the above-captioned matter, pursuant to a forthcoming memorandum. The following memorandum sets forth the basis for that ruling.

FACTS AND PROCEDURAL BACKGROUND

In this case, filed under 42 U.S.C. Sections 1983 and 1988, plaintiff alleges civil rights violations arising out of the death of one John Hintz (hereafter "Hintz") on July 11, 1986. Plaintiff Carol Jessen Hintz, the decedent's wife, filed suit on her own behalf and as personal representative of the estate of the deceased. Plaintiff alleges that on the evening of his death, Hintz was riding in a pickup truck along with a friend, Wade Sarrazin, when the defendants Keto, Wilson, and Tashjian stopped the vehicle to serve Hintz with a warrant. During the course of the stop, Hintz suffered a gunshot wound and later died. Although reports filed with the Sheriff's Office of Park County, Montana indicate that Hintz shot himself in the abdomen/chest area with a shotgun, plaintiff alleges that he did not die as a result of a

self-inflicted shot. To the contrary, plaintiff alleges that his death occurred while Hintz was "under the power and control of [defendants]"; that "the thing which caused the death of John Hintz was under the control and management of said Defendants"; and that his death "came as a direct result of the negligence and want of care of said Defendants". (Complaint, Count One, para. IX). Plaintiff further alleges that defendants used "arbitrary and excessive unjustified force" against Hintz (Complaint, Count One, para. X), pursuant to a pattern of conduct and/or a policy of the Sheriff's Department whereby "Sheriff's officers would summarily punish persons who refused to obey an officer's order, or did not obey quickly enough...by means of detention...and excessive use of force" (Complaint, Count Two, para. II). Plaintiff seeks to impose liability on

the defendant Park County, Montana (the "County"), based on its failure to take steps to terminate the "illegal pattern of conduct and/or policy and practices" (Complaint, Count Two, para. IV). Although not pled under 42 U.S.C. Section 1985, plaintiff also asserts the existence of a conspiracy between defendants to deprive Hintz of his civil rights. (Complaint, Count Four).

Finally, plaintiff asserts pendent claims under Montana law on her own behalf and that of Hintz, for assault and battery, intentional infliction of emotional distress, intentional infliction of physical injury, negligence, and gross negligence. (Complaint, Counts Three & Six).

The Court has carefully considered the briefs and supporting materials submitted by counsel, pursuant to Rule 56(c), Fed.R.Civ.P., as well as the oral arguments of counsel.

Having so done, the Court rules as follows.

DISCUSSION

First, the Court finds it instructive to review the standards applicable to motions for summary judgment. Rule 56(c), Fed.R.Civ.P., states that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." The moving party must initially identify those portions of the record before the Court which it believes establish an absence of material fact. T.W. Electrical Service, Inc. v. Pacific Electrical Contractors Ass'n., 809 F.2d 626, 630 (9th Cir. 1987). If the moving party adequately carries its burden, then the party opposing

summary judgment must then "set forth specific facts showing that there is a genuine issue for trial." Kaiser Cement Corp. v. Fischbach & Moore, Inc., 793 F.2d 1100, 1103-04 (9th Cir.), cert. denied, 479 U.S. 949 (1986).

All reasonable doubt as to the existence of genuine issues of material fact must be resolved against the moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). Nevertheless, "[d]isputes over irrelevant or unnecessary facts will not preclude a grant of summary judgment." T.W. Electrical Service, 809 F.2d at 630 (citing Liberty Lobby, 477 U.S. at 248). "A 'material' fact is one that is relevant to an element of a claim or defense and whose existence might affect the outcome of the suit. The materiality of a fact is thus determined by the substantive law governing the claim or defense." Id.

If a rational trier of fact might resolve

disputes raised during summary judgment proceedings in favor of the nonmoving party, summary judgment must be denied. Matsushita Electrical Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). Thus, the Court's ultimate inquiry is to determine whether the "specific facts" set forth by the nonmoving, viewed along with the undisputed background or contextual facts, are such that a rational or reasonable jury might return a verdict in its favor based on that evidence. Id. at 631. Having so stated, the Court now turns to the merits of the pending motion.

Section 1983 does not create any substantive rights, but "merely provides remedies for deprivations of rights established elsewhere." Oklahoma City v. Tuttle, 471 U.S. 808 (1985) (citing Baker v. McCollan, 443 U.S. 137, 140, 144, n. 3 (1979)). To state a cause of action under

Section 1983, plaintiff must show that (1) the conduct complained of was committed by a person acting under color of state law; and (2) the conduct deprived him of rights, privileges or immunities secured by the Constitution or law of the United States. Parratt v. Taylor, 451 U.S. 527, 535 (1981), overruled on other grounds, Daniels v. Williams, 474 U.S. 327 (1986).

Plaintiff alleges that the defendants deprived Hintz of his civil rights by causing his death, either negligently, grossly negligently, or through the unjustified use of arbitrary and excessive force. At the outset, the Court notes that mere negligence, as alleged by plaintiff at Count One, is not actionable under Section 1983. See Daniel v. Williams, 474 U.S. 327, 332 (1986). After careful consideration of the record before it, the court also concludes that there is simply

no evidence, beyond pure speculation or conjecture, to support plaintiff's claim of negligence, much less to support a finding of gross negligence or arbitrary and excessive conduct by defendants. Plaintiff has failed to identify any "specific facts" sufficient to overcome defendants' Motion for Summary Judgment. See Rule 56(c), Fed.R.Civ.P..

First, plaintiff was not present at the time of Hintz' death. All of the witnesses who were present have disputed plaintiff's theory that one of the defendants intentionally shot Hintz. Most significantly, Wade Sarrazin, Hintz's friend and the driver of the pickup truck in which Hintz was riding, contradicts plaintiff's allegations. Sarrazin testified in his deposition that there was no real "inkling of evidence" in his mind that somebody else shot Hintz, and that there was no doubt in his mind that Hintz shot himself.

This testimony was given after Sarrazin had reviewed and verified the essential accuracy of a statement given by him to authorities early in the morning of July 12, 1986, wherein he described the manner in which he saw Hintz hold the shotgun, point it at his chest, say "good-bye, Wade, I love you", and shoot himself. Sarrazin further stated that "the officers never fired their weapons." Plaintiff's attempt to weave a scenario supportive of her beliefs and her theory of the events surrounding Hintz's death is unavailing, in light of this direct witness testimony and the absence of evidence to the contrary.

Plaintiff further alleges that Hintz "was essentially under the power and control" of defendants at the time of his death, apparently attempting to invoke the substantive due process protections afforded

to those who have a special relationship with the state, such as a custodial relationship. See, e.g., Lipscomb v. Simmons, 884 F.2d 1242, 1246 (9th Cir. 1989) (citing Monmouth County Correctional Institutional Inmates v. Lanzare, 834 F.2d 326, 341 (3rd Cir. 1987); Deshaney v. Winnebago County Dept. of Social Services, 109 S.Ct. 998, 1005 (1989)). However, again there are no facts, only bald allegations, to indicate that Hintz was ever taken into the custody of the State, so as to impose some responsibility on defendants for his safety and general well-being. Absent such facts, there is no basis for imposing liability upon the individual defendants for any failure to prevent Hintz's self-inflicted injuries.

Furthermore, even assuming that the officers' liability could be established, there is no basis for a finding of liability on the part of the County. A municipality or

governmental entity may be held liable under Section 1983 only "when execution of a government's policy or custom...inflicts the injury." Monell v. Dept. of Soc. Servs., 436 U.S. 658, 694 (1978). The official policy or custom must be "'the moving force [behind] the constitutional violation.'" Canton v. Harris, 109 S.Ct. 1197, 1205 (1989) (quoting Monell, 436 U.S. at 694). Here, plaintiff alleges that the County had a policy or endorsed a pattern of conduct "under which Sheriff's' officers would summarily punish persons who refused to obey an officer's order, or did not obey quickly enough, whether such orders were lawful or not by means of detention, threat of charges of criminal law violation, and excessive use of force". (Complaint, Count Two, para. II). Once more, however, plaintiff presents no facts from which this Court or any reasonable jury could find that such a policy

existed. Plaintiff has failed to demonstrate the existence of any such express or affirmative policy by the County. Nor is there any evidence that a pattern of similar incidents occurred in the past, so that such a policy may be implied. Cf Shaw v. California Dept. of Alcoholic Beverage Control, 788 F.2d 600, 610 (9th Cir. 1986) (allegations of repeated incidents of discriminatory enforcement of the law over a four year period sufficient to constitute an allegation of official policy). Summary judgment is therefore properly granted in favor of the County defendant in this matter.

Moreover, to the extent that plaintiff alleges the existence of a conspiracy among defendants to violate Hintz's constitutional rights, under 42 U.S.C. Section 1985, the Court finds that summary judgment is also properly granted in favor of defendants.

Plaintiffs have failed to set forth specific facts in support of the allegation that defendants conspired together, see Karim-Panahi v. Los Angeles Police Dept., 839 F.2d 621, 626 (9th Cir. 1988), and have also failed to establish "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the [alleged] conspirators' action." Bretz v. Kelman, 773 F.2d 1026, 1029 (9th Cir. 1985) (quoting Griffin v. Breckenridge, 403 U.S. 88, 102 (1971)); see also Cassettari v. County of Nevada, 824 F.2d 735, 739 (9th Cir. 1987); Lonneker Farms, Inc. v. Klobucher, 804 F.2d 1096 (9th Cir. 1986).

Finally, since the federal claims are resolved prior to trial, this Court has a "powerful reason" to decline to exercise jurisdiction over the plaintiff's pendent state claims. United Mine Workers v. Gibbs,

383 U.S. 715, 726 (1966); Carnegie-Mellon University v. Cohill, 108 S.Ct. 614, 619 (1988). The Court finds that dismissal of the pendent claims is appropriate here, after consideration of the relevant factors. Carnegie-Mellon, 108 S.Ct. at 619 n.7.

For the foregoing reasons,

IT IS ORDERED that defendant's Motion for Summary Judgment is granted on plaintiff's claim under 42 U.S.C. Section 1983 and 1988.

IT IS FURTHER ORDERED that plaintiff's pendent state claims under Montana law are dismissed.

The Clerk is directed to enter judgment accordingly.

The Clerk is directed forthwith to notify counsel for the respective parties of the making of this order.

Done and dated this 23rd day of January, 1991.

s/JAMES F. BATTIN
Senior U.S. District Judge

Filed: January 23, 1991
Lou Aleksich, Jr. Clerk

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

BILLINGS DIVISION

CAROL JESSEN HINTZ, et al.,	)	
Plaintiffs,	)	CV-89-185-BLG-JFB
vs.	)	
PARK COUNTY, MONTANA, et al.,	)	ORDER
Defendants.	)	

On March 27, 1991, the Court heard oral argument on plaintiff's Motion for Reconsideration of the Court's previously issued Memorandum and Order of January 23, 1991. The prior order granted defendants'

Motion for Summary Judgment. After considering the arguments presented, and in light of the supporting briefs, the Court denied the Motion for Reconsideration in a bench ruling. The basis for that ruling is set forth below.

Three major grounds justify the reconsideration of prior orders: "(1) an intervening change in controlling law; (2) the availability of new evidence or an expanded factual record; and (3) need to correct a clear error or prevent manifest injustice." Kern-Tulare Water District v. City of Bakersfield, 634 F.Supp. 656, 665 (E.D. Cal. 1986); see also Boone v. United States, 743 F.Supp. 1367 (D. Hawaii 1990). A motion for reconsideration that presents no new arguments should be denied. Backlund v. Barnhart, 778 F.2d 1386 (9th Cir. 1985).

In the instant case, plaintiff has not

directed the Court's attention to any intervening change in the law; nor has she presented the Court with any new evidence or an expanded factual record. Instead, plaintiff contends that this Court inappropriately applied the standards governing burdens of proof on motion for summary judgment. After reviewing the record, the Court disagrees and finds that plaintiff has not shown that the Court's prior conclusions were clearly erroneous or manifestly unjust.

In accordance with the Court's bench ruling on March 27, 1991, therefore,

IT IS ORDERED that plaintiff's Motion for Reconsideration be and hereby is denied.

The Clerk is directed forthwith to notify counsel for the respective parties of the making of this Order.

Done and dated this 2nd day of April,

1991.

s/JAMES F. BATTIN
Senior U.S. District Judge

FILED: APRIL 2, 1991
Lou Aleksich, Jr. Clerk

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
SEP 23 1992
Cathy A. Catterson, Clerk
U.S. Court of Appeals

CAROL JESSEN HINTZ, Personal Representative of the Estate of John Hintz, deceased, and Carol Jessen Hintz in her own behalf,	)	No. 91-35517
Plaintiff-Appellant,	)	D.C. No. CV-89-00185-JFB
v.	)	
PARK COUNTY, Montana; ROBERT OAKLAND, individually and as former Sheriff of Park County, Montana; DENNIS FRAWLEY, individually and as former undersheriff and Deputy Sheriff of Park County, Montana; LEE ROY KETO, individually and as former	)	MEMORANDUM*

Sheriff's Deputy of Park County, Montana, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the District of Montana
James F. Battin, Chief District Judge, Presiding

Argued and Submitted September 18, 1992
Seattle, Washington

Before: WRIGHT, FLETCHER and CANBY, Circuit Judges.

Carol Jessen Hintz, the widow of John Hintz, sued Park County, Montana, and five former and current county sheriff's deputies under 42 U.S.C. Sections 1983 and 1988. She alleged that the deputies violated her husband's Fourth, Fifth, and Fourteenth Amendment rights. She also alleged related state tort claims. The district court granted summary judgment for the county and the deputies, and dismissed the state tort claims. Carol appeals.

I

On the evening of his death, John was riding in a pickup truck driven by Wade Sarrazin. The deputies stopped the truck to serve Hintz with a temporary restraining order and a contempt warrant. During the stop, he suffered a gunshot wound and died later. Reports filed with the sheriff's office indicated that John shot himself with a .410 gauge sawed-off shotgun. Carol disputes these reports.

II

a. County Sheriff's Deputies

Any person who, acting under color of state law, deprives another of a federally protected right may be liable under 42 U.S.C. Section 1983. Karim-Panahi v. Los Angeles Police Dep't, 839 F.2d 621, 624 (9th Cir. 1988). Carol alleges that the deputies caused John's death, depriving him of his civil rights.

Although all witnesses, including Wade Sarrazin, said that John shot himself, Carol argues that a genuine issue exists as to whether John committed suicide. First, she argues that both the shotgun's location and the absence of blood in Wade Sarrazin's truck show that John did not kill himself. Yet the shotgun's location is consistent with the witnesses' statements. The absence of blood in the truck does not contradict those statements.

Next, she contends that x-rays show that the shot in John's body was not from a .410 shotgun, and that the shot pattern indicates the gun was fired from up to 15 feet away from John. Her contentions are mere speculation, however, because they are unsupported by affidavits or experts' depositions.

She also asserts that a court may not presume death by suicide, citing Dick v. New

York Life Ins. Co., 359 U.S. 437 (1959) and Lewis v. New York Life Ins. Co., 113 Mont. 151, 124 P.2d 579 (Mont. 1942). Her reliance is misplaced. Both cases held that an insurer must prove that the insured committed suicide when denying coverage on that basis. Dick, 359 U.S. at 446; Lewis, 124 P.2d at 582.

Carol maintains that a genuine issue exists as to whether John was in the deputies' custody when he was shot. Again, no facts support this assertion. The deputies had not arrested him or placed him in custody. He also could have avoided the deputies by continuing to drive on the main road, or even passing them on the dirt road.

Although she did not plead claims under 42 U.S.C. Section 1985, she also argues that the deputies conspired to cover up the circumstances of her husband's death. She points out that the shotgun was destroyed

without a court order, no autopsy was performed, and no coroner's inquest was held. She fails to state a claim under Section 1985, however, because she does not allege "racial or class-based discrimination" or "class-based animus." Bretz v. Kelman, 773 F.2d 1026, 1028-30 (9th Cir. 1985)(en banc).

b. Park County

Counties may also be liable for deprivations of constitutional rights resulting from their policies or customs. See Karim-Panahi v. Los Angeles Police Dep't, 839 F.2d 621, 624 (9th Cir. 1988). Although Carol maintains that county policy permits sheriff's deputies to punish summarily persons who refuse to obey an officer's order, or those who do not obey quickly, she fails to give specific facts showing such a policy or a pattern of similar incidents.

The district court correctly granted

summary judgment for the deputies and Park County.

III

When federal claims are resolved before trial, the court may dismiss pendent state claims. United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966). The district court did not abuse its discretion by dismissing the state tort claims.

AFFIRMED.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
Dec 16 1992
Cathy A. Catterson, Clerk
U.S. Court of Appeals

CAROL JESSEN HINTZ, Personal Representative of the Estate of John Hintz, deceased, and Carol Jessen Hintz in her own behalf,

Plaintiff-Appellant,

v.

PARK COUNTY, Montana; ROBERT OAKLAND, individually and as former Sheriff of Park County, Montana; DENNIS FRAWLEY, individually and as former undersheriff and Deputy Sheriff of Park County, Montana; LEE ROY KETO, individually and as former Sheriff's Deputy of Park County, Montana et al

Defendants-Appellees.

No. 91-35517

D.C. No. CV-89-00185-JFB

O R D E R

Before: WRIGHT, FLETCHER and CANBY, Circuit Judges.

The Petition for Rehearing has been considered and DENIED.

EXHIBIT "B"

958 F.2d 881 (9th Cir. 1992)

Orlean HOPKINS, Individually, and Melba Lazenby-Jenkins as Administratix of the Estate of Jerry Stancill, Plaintiffs-Appellants,

v.

Marc ANDAYA, George T. Hart, and the City of Oakland, Defendants-Appellees.

No. 89-16368.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted March 12, 1991.

Decided March 5, 1992.

As Amended March 24, 1992.

Civil rights action and wrongful death claim was brought on behalf of person who was shot nine times by police officer against police officer, chief of police and city. The United States District Court for the Northern District of California, Samuel Canti, J., granted summary judgment in favor of the defendants, and plaintiffs appealed. The

Court of Appeals held that material issues of fact precluded granting summary judgment in favor of defendants.

Reversed and remanded.

1. **Federal Courts Key #776**

Court of Appeals will review de novo a grant of summary judgment. Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

2. **Federal Civil Procedure Key #2543**

On summary judgment, evidence must be viewed in light most favorable to nonmoving party. Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

3. **Federal Civil Procedure Key #2544**

Party moving for summary judgment has burden of proving absence of any genuine issue of material fact that would allow judgment as matter of law.

4. **Federal Civil Procedure Key #2546**

District court's function on motion for summary judgment is not to make credibility

determinations, but, rather, trial judge determines whether evidence presented is such that jury applying evidentiary standard could reasonably find for either the plaintiff or the defendant.

5. **Federal Civil Procedure Key #2544**

Once party moving for summary judgment demonstrates absence of genuine issue of material fact, burden shifts to nonmoving party to produce evidence sufficient to support jury verdict in her favor, which requires the nonmoving party to go beyond pleadings and show by her own affidavits, or depositions, answers to interrogatories, or omissions on file, that genuine issue of material fact exists. Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

6. **Arrest Key #68(4)**

Apprehension by use of deadly force is seizure subject to reasonableness requirement

of Fourth Amendment. U.S.C.A. Const.Amend. 4.

7. Civil Rights Key #244

While question of reasonableness of police officer's force is usually a question of fact for jury in civil rights action alleging unreasonable use of force, court may make a determination as to reasonableness where, viewing evidence in light most favorable to plaintiff, evidence compels conclusion that officer's use of force was reasonable. U.S.C.A. Const.Amend. 4; 42 U.S.C.A. Sections 1983, 1988.

8. Federal Civil Procedure Key #2546

Medical report containing police officer's statement to medical staff was competent evidence that district court could consider to determine threat that police officer actually faced, in opposition to motion for summary judgment in civil rights action brought against officer who shot and killed a suspect

allegedly in self defense. 42 U.S.C.A. Section 1983; Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

9. Federal Civil Procedure Key #2491.5

Material issues of fact precluded granting summary judgment in favor of police officer in civil rights action alleging excessive force brought on behalf of person who was shot nine times by the police officer; medical evidence in record undermined officer's version of events in numerous ways, and it could not be said as matter of law that the officer acted reasonably when he used deadly force against person a second time. U.S.C.A. Const.Amend. 4; 42 U.S.C.A. Sections 1983, 1988.

10. Civil Rights Key #206(4), 207(2)

Chief of police and city could be held liable in civil rights action brought on behalf of person who was shot nine times by police officer, even if the officer was

exonerated; chief and city could be held liable for improper training or improper procedure, in that they put officer on street who was so badly trained and instructed he let his baton be taken away from him and then had to kill an armed civilian to save his own life. 42 U.S.C.A. Sections 1983, 1988.

11. Limitation of Actions Key #182(5)

Under California law, failure to raise statute of limitations defense promptly constitutes waiver of that defense.

Thomas H. Crawford, San Francisco, Cal., for plaintiffs-appellants.

Karen A. Silverstein, Asst. City Atty., Jayne W. Williams, City Atty., Oakland, Cal., for defendants-appellees.

Appeal from the United States District Court for the Northern District of California.

Before D.W. NELSON, KOZINSKI and T.G.

NELSON, Circuit Judges.

PER CURIAM:

On the night of May 21, 1984, Marc Andaya shot and killed Jerry Stancill. Appellants Orlean Hopkins, the mother of the decedent and Melba Lazenby-Jenkins, Stancill's daughter, brought this action, alleging claims under 42 U.S.C. Section 1983 and 42 U.S.C. Section 1988 and the California wrongful death statute. Hopkins and Lazenby-Jenkins appeal the summary judgment granted in favor of defendants/appellees, Marc Andaya, the City of Oakland, the Oakland police department and its police chief. We reverse and remand the district court's grant of summary judgment and its decision to dismiss appellant's pendent California wrongful death claims.

I. Facts

Oakland Police Officer Marc Andaya responded to a call on the night of May 21,

1984 reporting that Jerry Stancill was creating a disturbance at the Capri Motel.[1] Because Stancill had allegedly threatened "to shoot the place up", Andaya searched Stancill and determined that he was unarmed. He then sent Stancill on his way.

During this encounter, Andaya observed Stancill acting strangely and talking to himself in an illogical manner. He and a fellow officer followed Stancill and stopped him to determine whether Stancill should be detained for a psychiatric evaluation in accordance with California law. The officers did not detain Stancill because they did not feel that he posed "a threat to himself or others."

A short time later, Andaya was completing paperwork in a parking lot when he heard Stancill "howling or braying" under a traffic light. When Stancill began to walk back

towards the Capri Motel, Andaya pulled his car into an abandoned lot behind Stancill and sounded his siren. Stancill then approached the car.

According to Andaya, Stancill put his hands on the police car in a frisk position, and asked "what are you going to do?" Andaya claims that Stancill's manner then changed: he became hostile and began approaching Andaya in a threatening manner. Andaya testified that he backed away, and drew his baton and began hitting Stancill's arms to keep him away. Andaya then says that Stancill grabbed Andaya's baton and caused him to fall backwards and hit his head on the ground. Andaya says this blow as sufficiently hard to "daze" him.

According to Andaya, Stancill then hit him with the baton "at least ten times" in spite of Andaya's effort to evade the blows. Andaya

claims that after a minute or so or repeated blows and kicks to the head or body, he drew his revolver and warned Stancill to stop. Stancill kept attacking, so Andaya shot at him six times at a range of three to four feet in several spaced volleys.

Andaya testified that he knew the shots had hit Stancill since he saw blood and told Stancill "You're hurt. Don't get up." However, he also stated that the shots did not stop Stancill from coming at him. He then managed to bring Stancill to the ground and wrestled with him for about a minute. Andaya then claims he managed to get up and back away, but that Stancill got up as well. With Stancill advancing on him, Andaya claims that he somehow managed to radio for help, throw the radio down, empty the spent cartridges from his revolver and reload it, cross the street and hide behind a car in a gas station on the

other side of the street. Once again Stancill advanced on Andaya. After warning Stancill again to stop, Andaya fired four more bullets at close range. Andaya says that Stancill was still standing after the four shots were fired. Andaya does not remember anything else until he was lifted into an ambulance.

Jerry Stancill died from nine gunshot wounds: two to the head, five to the torso and one in each hand. The report of the doctor who examined Andaya the night of the shooting indicated that he had bruises on his arms, back, and legs, but not on his head. The medical report also indicated that Andaya's injuries were not serious.

The declaration of an eyewitness, Greg Lassonde, contradicts Officer Andaya's testimony in important respects. According to Lassonde, Stancill was indeed pursuing Andaya, and Andaya fell or was pushed backwards.

Stancill then leaned over Andaya and began grabbing at him with his hands. According to Lassonde, however, Stancill at no time had possession of the baton and did not hit Andaya with it. Instead, Andaya began firing almost immediately after he fell, without issuing a warning. Lassonde also denies that the two wrestled on the ground after Andaya fired the first six shots. Instead, he claims that Andaya was standing by the time he fired the last shot in the first volley.

Andaya has a history of citizen complaints of excessive force, a reputation for being quick-tempered, and has been at the center of several incidents involving inappropriate use of his firearm.

Appellants, decedent's mother and daughter, filed this action May 20, 1987, alleging violations of 42 U.S.C. Section 1983 and Cal.Code Civ.Procedure Section 377

(wrongful death). Appellees filed a motion for summary judgment on June 2, 1989, relying on the testimony of Officer Andaya and several other members of the Oakland Police Department. Appellants fiied their opposition to this motion on June 16, 1989. To bolster their opposition, they attached the medical records and evidence of Andaya's prior and subsequent record in the Department. They did not depose Greg Lassonde, even though he was on appellants' witness list for trial.

Without the benefit of any evidence from Lassonde, the district court granted summary judgment for appellees on the section 1983 claims on July 21, 1989. The court dismissed the California wrongful death claim "for lack of pendent jurisdiction." On August 4, 1989, appellants filed a motion for reconsideration which included for the first time the declaration of Greg Lassonde. The court

denied this motion on September 29, 1989, and this appeal ensued.

II. Standard of Review

[1,2] The court review de novo a grant of summary judgment. Fed.R.Civ.P. 56; Kruso v. Int'l Tel. & Tel. Corp., 872 F.2d 1416, 1421 (9th Cir. 1989), cert. denied, ____ U.S. ____, 110 S.Ct. 3217, 110 L.Ed.2d 664 (1990). On summary judgment, the evidence must be viewed in the light most favorable to the nonmoving party. Anderson v. Liberty Lobby Inc., 477 U.S. 242, 255, 106 S.Ct. 2505, 2513, 91 L.Ed.2d 202 (1986).

[3,4] The party moving for summary judgment has the burden of proving the absence of any genuine issue of material fact that would allow a judgment as a matter of law. Id., 477 U.S. at 256, 106 S.Ct. at 2514. The court's function on summary judgment is not to make credibility determinations. Id., 477

U.S.C. at 255, 106 S.Ct. at 2513.[2] The trial judge determines whether the evidence presented is such that a jury applying the evidentiary standard could reasonably find for either the plaintiff or the defendant. Id.

[5] However, once the moving party demonstrates the absence of a genuine issue of material fact, the burden shifts to the nonmoving party to produce evidence sufficient to support a jury verdict in her favor. Id., 477 U.S. at 256-257, 106 S.Ct. at 2514-15. In meeting this burden, the nonmoving party must go beyond the pleadings and show "by her own affidavits, or by the depositions, answers to interrogatories, or admissions on file" that a genuine issue of material fact exists. Celotex Corp. v. Catrett, 477 U.S. 317, 324, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986).

III. Summary Judgment

[6] Apprehension by use of deadly force is

a seizure subject to the reasonableness requirement of the Fourth Amendment. Tennessee v. Garner, 471 u.S. 1, 7, 105 S.Ct. 1694, 1699, 85 L.Ed.2d 1 (1985). In Graham v. Connor, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989), the Supreme Court held:

> The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.
>
> ...
>
> The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments--in circumstances that are tense, uncertain, and rapidly evolving--about the amount of force that is necessary in a particular situation.

490 U.S. at 396-397, 109 S.Ct. at 1872

(citations ommitted). In determining whether an officer acted reasonably under the Fourth Amendment, we must consider the "severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." Id., 490 U.S. at 396, 109 S.Ct. at 1872.

[7] Appellants contend that there is a triable issue of fact as to whether Andaya used unreasonable force against Stancill.[3] The question of the reasonableness of force is usually a question of fact for the jury. However, on summary judgment, the court may make a determination as to reasonableness where, viewing the evidence in the light most favorable to Hopkins, the evidence compels the conclusion that Andaya's use of force was reasonable. In the unusual circumstances of

this case, two troubling factual issues lead us to conclude that summary judgment is inappropriate.

A. The Medical Evidence

First, the medical evidence in the record undermines Andaya's story in numerous ways. Shortly after the shootings, Andaya was examined by a physician at the emergency room of the Samuel Merritt Hospital in Oakland. The report of that examination makes for informative reading.

The medical report starts with an account of Andaya's statement to the medical staff concerning the cause of his injuries:

> [T]he patient says that he was hit on his head and on his left elbow with a baton. He believes that he was bitten on his right forearm. He also complains of some pain over the right upper leg and the sacral area. He does not believe that

he lost consciousness. He has not had any difficulty with vision or nausea or vomiting since the incident.

Andaya's statement to the medical staff conflicts in significant respects iwth his deposition testimony. To the medical staff he complains only of being hit on the head.and left elbow with a baton; in his deposition, he claims there were 10-20 blows to all parts of his body, and that he struck his head when he fell backwards. To the medical staff he tells of bites; during his deposition, he says nothing about having been bitten. To the medical staff he says that he does not believe he lost consciousness; in his deposition, he claims he lost consciousness (or nearly lost consciousness) twice: first, at the time he fell backwards and struck his head in the parking lot ("I might have blacked out for a second as my head hit"), and second, after he

shot Stancill the second time in the gas station ("The next person I actually remember is my friend, Michael Hallinan. I was getting into the--the ambulance").

[8] The medical report containing Andaya's statement to the medical staff was submitted by Hopkins in opposition to the motion for summary judgment; it is competent evidence that the district court may consider under Rul 56(c). In determining the threat Andaya really faced, the jury would be entitled to consider the milder version of the altercation contained in the statement Andaya made closer to the time of the incident: that he was hit only once or twice with the baton; that he never hit his head on the ground; that he never passed out.

[9] Given this milder version of the threat Andaya faced, a jury could reasonably conclude that the force he used was excessive.

In reaching this conclusion, the jury might well be aided by the substance of the medical report. The report, in its entirety, states as follows:

> Vital Signs: Blood pressure 118/50, temperature 99.7, respiration s 20.
>
> General: The patient is alert and oriented.
>
> HEENT: External ocular muscles are intact. Pupils are equal and reactive. Fundi are benign. TMs are clear. There is no tenderness or deformity over the facial bones or the skull.
>
> Chest: Clear with breath sounds bilaterally equal.
>
> Heart: Regular rhythm without murmur.
>
> Abdomen: Soft, nontender with active bowel sounds.
>
> Musculoskeletal: There is no tenderness

or deformity over the cervical, thoracic spine. There is some tenderness over the lower lumbar spine and the sacral area. There is no deformity. There is no tenderness or deformity over the ribs or the pelvis.

Extremities: There is a hematoma over the lateral aspect of the left elbow. There is no deformity or limitation of motion at the elbow. Distal motor, sensory and pulses are intact. There is a superficial laceration of the right forearm which is approximately 1/2 inch in length. The laceration is superficial and not through all layers of the skin. There is no tenderness over the bones of the forearm. Distal motor, sensory and pulses are intact. The left upper leg has a contusion over the lateral aspect. There is otherwise no tender-

ness or deformity over the lower extermities. X-Rays of the right forearm, the left elbow and the lumbosacral spine, preliminary reading, all negative.

...

DIAGNOSIS: Superficial laceration of the right forearm. Contusion of the left elbow, the left lower back and the left upper leg.

DISCHARGE INSTRUCTIONS: The patient has instructed to ice his elbow tonight, keep the wound bandaged. He was instructed to see the City Physician tomorrow.

(emphasis added). Even without the help of experts, a jury could look at this report and conclude that Officer Andaya was never in any serious danger.

B. The Second Shooting

Andaya, according to his own account, used deadly force not once but twice. The first was in the parking lot where the altercation began. Andaya found himself under attack by Stancill, who had gotten ahold of Andaya's night stick and was using it to hit the officer ten or twenty times over his head, back, shoulders and arms. The second use of force occurred several minutes later in the Arco station, after Andaya had managed to break away following the first shooting.

Andaya's story, even if believed in every particular, would justify his use of deadly force only the first time, where Stancill was allegedly beating him. While we might question the competence of an officer who is disarmed by a single, unarmed, mentally deranged man, we really can't quibble with his use of deadly force to avoid being bludgeoned to death with his own club.

But that is not the crucial shooting, because Stancill was still alive after Andaya emptied his revolver the first time. The critical encounter--the one where Andaya deliver the lethal shot--came later, after what can only be described as a bizarre series of events.

According to Andaya, he managed to break away from Stancill after discharging his weapon; Stancill followed at a brisk pace. The baton--the one that had caused Andaya to fear for his life--was gone:

> Q: Did [Stancill] have anything in his hands?
>
> A: No, sir, not that I could see.[4]

Officer Andaya saw blood on Stancill's body and he was wounded, since he yelled to Stancill, "You're hurt. Don't get up." He used his radio to call for backups, gave his location, and threw the radio down. He then

emptied the spent cartridges from his gun and reloaded using a speed loader. He crossed MacArthur Boulevard into an Arco gas station. Stancill still had nothing in his hands, but moved to within a car length of Andaya. Andaya yelled at him to stop and leave him alone, but Stancill kept coming towards him. Andaya then shot Stancill four more times, killing him.

Once Andaya managed to break away from Stancill and pepper him with five bullets, the exigency of the situation lessened dramatically. The officer was holding an empty gun, a police radio and a small baton, any of which could have been used as a defensive weapon. He was being pursued by an unarmed civilian he knew was wounded. The officer had the time (and the presence of mind) to use his radio to "put on my call sign and put out a 40B...Officer down and needs help." He had the time and elbow room to empty

his revolver and reload it. He managed to cross a major thoroughfare, reach a gas station and put a car between himself and his assailant.

Accepting all of these facts, we cannot say as a matter of law that Andaya acted reasonably when he then shot the unarmed Stancill four more times. At the time of the second shooting, it was far from clear that Andaya reasonably feared for his life. Stancill had been wounded and was unarmed; Andaya was armed with several weapons and could hide behind a car. Andaya had already called for help; he needed only to delay Stancill for a short period of time. He could have evaded Stancill, or he could have attempted to subdue him with his fists, his feet, his baton or the butt of his gun. To endorse Andaya's chosen course of action--firing four more shots--would be to

say that a police officer may reasonably fire repeatedly upon an unarmed, wounded civilian even when alternative courses of action are open to him.[5]

C. Conclusion

While these factual conflicts concerning the sequence of events and the true nature of the threat confronting Andaya might be resolved in Andaya's favor at trial, it is neither our job nor the job of the district court to resolve these conflicts in the evidence on a motion for summary judgment. It is true that only Andaya's first-hand testimony was presented. However, circumstantial evidence can speak clearly and often unequivocally; properly construed, it is as objective and reliable as any other evidence. As a great trial lawyer once said, "We better know there is a fire whence we see much smoke rising than we could know it by one

or two witnesses swearing to it. The witnesses may commit perjury, but the smoke cannot." Abraham Lincoln, Unsent Letter to J.R. Underwood and Henry Grider, October 26, 1894, reprinted in The Quotable Laywer, 323 (1986) (Schrager and Frost eds.). We reverse the grant of summary judgment in favor of Andaya.

[10] We also reverse the grant of summary judgment in favor of Hart and the City. The district court dismissed the claims against the chief of police and the city on the theory that, if Andaya is not liable, neither are they. Because Andaya may be held liable under our disposition of the case, so may the other defendants. In any event, the police chief and city might be held liable for improper training or improper procedure even if Andaya is exonerated, since they put an officer on the street who is so badly trained and

instructed he lets his baton be taken away from him and then has to kill an unarmed civilian to save his own life. Andaya has a history of citizen complaints of excessive force, a reputation for being quick-tempered, and has drawn or fire his gun inappropriately several times before. These facts would certainly bear on whether the city properly trained Andaya, and whether they should have sent him out on the streets carrying a weapon.

IV. Pendent Jurisdiction

Appellants also brought wrongful death claim under California law. Although appellees did not seek summary judgment on the state wrongful death claim, the district court dismissed the state claim along with the federal claims "for lack of pendent jurisdiction." Because of our disposition of the federal claims, we vacate the dismissal of appellants' state law claims and remand to the

district court so that it may determine whether to hear them along with the federal claims at trial.

[11] One factor will complicate the district court's evaluation on remand. The statute of limitations for actions under Cal.Code Civ.Procedure Section 377 is generally one year. Cal.Code Civ.Procedure Section 340. Because this action was filed on May 20, 1987, nearly three years after Jerry Stancill's death, the pendent state claim appears to have been time-barred when filed. However, appellees have never raised this objection at any state of this proceeding. Under California law, failure to raise a statute of limitations defense promptly constitues a waiver of that defense. Getz v. Wallace, 236 Cal.App.2d 212, 213, 45 Cal.Rptr. 910 (1965); Ridley v. Young, 64 Cal.App.2d 503, 509, 149 P.2d 76 (1944) (failure to plead

statutory bar in either demurrer or answer constituted waiver). It thus appears that, had this claim been filed in California court originally, the statute of limitations objection would have been waived, and the California courts would hear appellants' claim.

On remand, the district court should determine whether California courts would have heard this claim if it were filed originally in state court. If so, it should entertain the state claims on remand.

V. Conclusion

The district court's decision to grant summary judgment on appellants' federal claims is reversed and remanded. The decision to dismiss the state claim is reversed and remanded for reconsideration in accordance with this opinion.

REVERSED AND REMANDED.

1 Much of the factual description that follows is taken from the testimony of Officer Andaya, a witness with an obvious interest in the outcome of this case.

2 Appellants rely upon Cal.Code Civ.Procedure Section 437(c) for the proposition that summary judgment is improper where it relies upon the testimony of a party-defendant. This suit is not in California state court, however. The Federal Rules of Civil Procedure, which govern this litigation in federal court, provide that summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). According to this rule, deposition testimony can be sufficient as a basis for granting summary judgment.

3 Police officers are entitled to assert a defense of qualified immunity from section 1983 liability if they reasonably believed in good faith that their actions were constitutional. Smiddy v. Varney, 665 F.2d 261, 266 (9th Cir. 1981), cert. denied, 459 U.S. 829, 103 S.Ct. 65, 74 L.Ed.2d 66 (1982). In Fourth Amendment unreasonable force cases, unlike in other cases, the qualified immunity inquiry is the same as the inquiry made on the merits. See, e.g., Curnow v. Ridgecrest Police, 952 F.2d 32, 325 (9th Cir., 1991)(defendant in "unreasonable force" case is entitled to qualified immunity if "the totality of the circumstances...justified the

particular type of seizure"). Hunter v. District of Columbia, 943 F.2d 69, 75 (D.C.Cir. 1991); Jackson v. Hoylman, 933 F.2d 401, 402-03 (6th Cir. 1991); Street v., Parham, 929 F.2d 537-540-41 & n.2 (10th Cir. 1991). For this reason, we do not consider the qualified immunity issue separately in this case.

4 Andaya testified to this point more than once:

> Q: At that time, did he have anything in his hands?
> A: No, sir.

5 In reaching this conclusion, we do not rely on the affidavit of Greg Lassonde. Lassonde was listed as a witness to the incident in appellants' pretrial statement. Appellants knew of the witness and could have deposed him or submitted his affidavit to contest the summary judgment motion. Appellants offer no excuse for not presenting the affidavit earlier. A defeated litigant cannot set aside a judgment because he failed to present on a motion for summary judgment all the facts known to him that might have been useful to the court. See Northwest Acceptance Corp. v. Lynnwood Equip., 841 F.2d 918, 925-26 (9th Cir. 1988) (district court has discretion not to consider claims not raised until motion for reconsideration); Schanen v. United States Dept. of Justice, 762 F.2d 805, 807-08 (9th Cir. 1985) (no abuse of discretion to refuse to consdier new arguments in Rule 60(b) motion, even though "dire consequences" might result, neglect in failing to respond to summary judgment motion was "inexcusable"), reaffirmed as modified, 798 F.2d 348 (9th Cir. 1985); Fay Corp. v. Bat

Holdings I, Inc., 651 F.Supp. 307, 309 (W.D. Wash.1987) ("Motions for reconsideration...are not justified on the basis of new evidence which could have been discovered prior to the Court's ruling;" collecting cases).

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477 U.S. 317, 91 L.Ed.2d 265

106 S.Ct. 2548 (1986)

CELOTEX CORPORATION, Petitioner

v.

Myrtle Nell CATRETT, Administratix of the Estate of Louis H. Catrett, Deceased.

No. 85-198.

Argued April 1, 1986.

Decided June 25, 1986.

Administratix of estate of deceased worker brought action against absestos manufacturer. The United States District Court for the District of Columbia granted manufacturer's motion for summary judgment and administratix appealed. The Court of Appeals for the District of Columbia Circuit, 756 F.2d 181,

reversed. The Supreme Court, Justice Rehnquist, held that: (1) Rule 56(c) mandates the entry of summary judgment after adequate time for discovery against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case as to which that party will bear the burden of proof at trial; (2) there is no requirement that moving party support its motion with affidavits or other similar materials negating the opponent's claim; and (3) nonmoving party need not produce evidence in a form that would be admissible at trial in order to avoid summary judgment.

Reversed and remanded.

Justice White filed an opinion concurring in the Court's opinion and judgment.

Justice Brennan filed a dissenting opinion in which Chief Justice Burger and Justice Blackmun joined.

Justice Stevens filed a dissenting opinion.

Opinion on remand, 826 F.2d 33.

1. Federal Civil Procedure Key #2466

Entry of summary judgment is mandated, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish that existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

2. Federal Civil Procedure Key #2470

Where party will have burden of proof on an element essential to its case at trial and does not, after adequate time for discovery, make a showing sufficient to establish the existence of that element, there can be no genuine issue as to any material fact since a complete failure of proof concerning an

essential element of the nonmovant's case necessarily renders all other facts immaterial. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

3. Federal Civil Procedure Key #2535

Party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the pleadings, depositions, answers to interrogatories, and admission on file, together with affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

4. Federal Civil Procedure Key #2536

There is no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials negating the opponent's claim.

Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

5. Federal Civil Procedure Key #2536

Regardless of whether the moving party accompanies its summary judgment motion with affidavits, the motion may and should be granted so long as whatever is before the district court demonstrates that the standard for the entry of summary judgment set forth in Rule 56(c) is satisfied. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

6. Federal Civil Procedure Key #2536

Where nonmoving party will bear burden of proof at trial on a dispositive issue, summary judgment motion may properly be made in reliance solely on the pleadings, depositions, answers to interrogatories, and admission on file and such a motion, whether or not accompanied by affidavits, will be "made and supported as provided in this rule" so that the nonmoving party must go beyond the

pleadings to show that there is a genuine issue for trial. Fed.Rules Civ.Proc. Rule 56(e), 28 U.S.C.A.

7. Federal Civil Procedure Key #2545

Nonmoving party need not procedure evidence in a form that would be admissible at trial in order to avoid summary judgment. Fed.Rules Civ.Proc.Rule 56(e), 28 U.S.C.A.

8. Federal Civil Procedure Key #2536, 2544

Last two sentences of Rule 56(e) precluding a nonmoving party from resting on its pleadings to avoid summary judgment were added to disapprove a line of cases allowing a party opposing summary judgment to resist a properly made motion by reference only to its pleadings and were not intended to reduce the burden of the moving party or to add to that burden. Fed.Rules Civ.Proc.Rule 56(e), 28 U.S.C.A.

9. Federal Civil Procedure Key #2461

Summary judgment procedure is properly regarded not a disfavored procedural shortcut but, rather, as an integral part of the federal rules as a whole, which are designed to secure the just, speedy, and inpensive determination of every action. Fed.Rules Civ.Proc.Rules 1, 56, 28 U.S.C.A.

10. Federal Civil Procedure Key #2461

Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury but also for the rights of persons opposing such claims and defenses to demonstrate, in the manner provided by the rule prior to trial, that the claims and defenses have no factual basis. Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

Syllabus*

In September 1980, respondent

administratix filed this wrongful-death action in Federal District Court, alleging that her husband's death in 1979 resulted from his exposure to asbestos products manufactured or distributed by the defendants, who included petitioner corporation. In September 1981, petitioner filed a motion for summary judgment, asserting that during discovery respondent failed to produce any evidence to support her allegation that the decedent had been exposed to petitioner's products. In response, respondent produced documents tending to show such exposure, but petitioner argued that the documents were inadmissible hearsay and thus could not be considered in opposition to the summary judgment motion. In July 1982, the court granted the motion because there was no showing of exposure to petitioner's products, but the Court of Appeals reversed, holding that summary

judgment in petitioner's favor was precluded because of petitioner's failure to support its motion with evidence tending to negate such exposure, as required by Federal rule 56(e) of Civil Procedure and the decision in Adickes v. S.H. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142.

Held:

1. The Court of Appeals' position is inconsistent with the standard for summary judgment set forth in Rule 56(c), which provides that summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Pp. 2552-2554.

(a) The plain language of Rule 56(c) mandates the entry of summary judgment, after

adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof. Pp. 2552-2553.

(b) There is no express or implied requirement in Rule 56 that the moving party support its motion with affidavit or other similar materials negating the opponent's

claim. On the contrary, Rule 56(c), which refers to the affidavits, "if any," suggests the absence of such a requirement, and Rule 56(a) and (b) provide that claimants and defending parties may move for summary judgment "with or without supporting affidavits." Rule 56(e), which relates to the form and use of affidavits and other materials, does not require that the moving party's motion always be supported by affidavits to show initially the absence of a genuine issue for trial. Adickes v. S.H. Kress & Co., supra, explained. Pp. 2553-2554.

(c) No serious claim can be made that respondent was "railroaded" by a premature motion for summary judgment, since the motion was not filed until one year after the action was commenced and since the parties had conducted discovery. Moreover, any potential problem with such premature motions can be

adequately dealt with under Rule 56(f). P. 2554.

2. The questions whether an adequate showing of exposure to petitioner's products was in fact made by respondent in opposition to the motion, and whether such a showing, if reduced to admissible evidence, would be sufficient to carry respondent's burden of proof at trial, should be determined by the Court of Appeals in the first instance. Pp. 2554-2555.

244 U.S.App.D.C. 160, 756 F.2d 181, reversed and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which WHITE, MARSHALL, POWELL, and O'CONNOR, JJ., joined. WHITE,J., filed a concurring opinion, post, p. 2555. BRENNAN, J., filed a dissenting opinion, in which BURGER, C.J., and BLACKMUN, J., joined, post, p. 2555. STEVENS, J., filed a dissenting

opinion, post, p. 2560.

Leland S. Van Koten, Baltimore, Md., for petitioner.

Paul March Smith, for respondent.

Justice REHNQUIST delivered the opinion of the Court.

The United States District Court for the District of Columbia granted the motion of petitioner Celotex Corporation for summary judgment against respondent Catrett because the latter was unable to produce evidence in support of her allegation in her wrongful-death complaint that the decedent had been exposed to petitioner's asbestos products. A divided panel of the Court of Appeals for the District of Columbia Circuit reversed, however, holding that petitioner's failure to support its motion with evidence tending to negate such exposure precluded the

entry of summary judgment in its favor. Catrett v. Johns-Mansville Sales Corp., 244 U.S.App.D.C. 160, 756 F.2d 181 (1985). This view conflicted with that of the Third Circuit in In re Japanese Electronics Products, 723 F.2d 238 (1983), rev'd on other grounds sub. nom. Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). We granted certiorari to resolve the conflict, 474 U.S. 944, 106 S.Ct. 342, 88 L.Ed.2d 285 (1985), and now reverse the decision of the District of Columbia Circuit.

Respondent commenced this lawsuit in September 1980, alleging that the death in 1979 of her husband, Louis H. Catrett, resulted from his exposure to products containing asbestos manufactured or distributed by 15 named corporations. Respondent's complaint sounded in negligence,

breach of warranty, and strict liability. Two of the defendants filed motions challenging the District Court's in personam jurisdiction, and the remaining 13, including petitioner, filed motions for summary judgment. Petitioner's motion, which was first filed in September 1981, argued that summary judgment was proper because respondent had "failed to produce evidence that any [Celotex] product...was the proximate cause of the injuries alleged within the jurisdiction limits of [the District] Court." In particular, petitioner noted that respondent had failed to identify, in answering interrogatories specifically requesting such information, any witnesses who could testify about the decedent's exposure to petitioner's asbestos products. In response to petitioner's summary judgment motion, respondent then produced three documents which she claimed

"demonstrate that there is a genuine material factual dispute" as to whether the decedent had ever been exposed to petitioner's asbestos products. The three documents included a transcript of a deposition of the decedent, a letter from an official of one of the decedent's former employers whom petitioner planned to call as a trial witness, and a letter from an insurance company to respondent's attorney, all tending to establish that the decedent had been exposed to petitioner's asbestos products in Chicago during 1970-1971. Petitioner, in turn, argued that the three documents were inadmissible hearsay and thus could not be considered in opposition to the summary judgment motion.

In July 1982, almost two years after the commencement of the lawsuit, the District Court granted all of the motions filed by the various defendants. The court explained that

it was granting petitioner's summary judgment motion because "there [was] no showing that the plaintiff was exposed to the defendant Celotex's product in the District of Columbia or elsewhere within the statutory period." App. 217.[2] Respondent appealed only the grant of summary judgment in favor of petitioner, and a divided panel of the District of Columbia Circuit reversed. The majority of the Court of Appeals held that petitioner's summary judgment motion was rendered "fatally defective" by the fact that petitioner "made no effort to adduce any evidence, in the form of affidavits or otherwise, to support its motion." 244 U.S.App.D.C., at 163, 756 F.2d, at 184 (emphasis in original). According to the majority, Rule 56(e) of the Federal Rules of Civil Procedure,[3] and this Court's decision in Adickes v. S.H. Kress & Co., 398 U.S. 144,

159, 90 S.Ct. 1598, 1609, 26 L.Ed.2d 142 (1970), establish that "the party opposing the motion for summary judgment bears the burden of responding only after the moving party has met its burden of coming forward with proof of the absence of any genuine issues of material fact." 244 U.S.App.D.C., at 163, 756 F.2d, at 184 (emphasis in original; footnote omitted). The majority therefore declined to consider petitioner's argument that none of the evidence produced by respondent in opposition to the motion for summary judgment would have been admissible at trial. Ibid. The dissenting judge argued that "[t]he majority errs in supposing that a party seeking summary judgment must always make an affirmative evidentiary showing, even in cases where there is not a triable, factual dispute." Id., at 167, 756 F.2d, at 188 (Bork, J., dissenting). According to the dissenting judge, the

majority's decision "undermines the traditional authority of trial judges to grant summary judgment in meritless cases." Id., at 166, 756 F.2d, at 187.

[1,2] We think that the position taken by the majority of the Court of Appeals is inconsistent with the standard for summary judgment set forth in Rule 56(c) of the Federal Rules of Civil Procedure.[4] Under Rule 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law" In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing

sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the non-moving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof. "[T]h[e] standard [for granting summary judgment] mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a)...." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986).

[3-5] Of course, a party seeking summary

judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact. But unlike the Court of Appeals, we find no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials negating the opponent's claim. On the contrary, Rule 56(c), which refers to "the affidavits, **if any**" (emphasis added), suggests that absence of such a requirement. And if there were any doubt about the meaning of Rule 56(c) in this regard, such doubt is clearly removed by Rules 56(a) and (b), which provide that claimants and defendants, respectively, may move for

summary judgment **"with or without supporting affidavits"** (emphasis added). The import of these subsections is that, regardless of whether the moving party accompanies its summary judgment motion with affidavits, the motion may, and should, be granted so long as whatever is before the district court demonstrates that the standard for the entry of summary judgment, as set forth in Rule 56(c), is satisfied. One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and we think it should be interpreted in a way that allows it to accomplish this purpose.[5]

[6] Respondent argues, however, that Rule 56(e), by its terms, places on the nonmoving party the burden of coming forward with rebuttal affidavits, or other specified kinds of materials, only in response to a motion for

summary judgment "made and supported as provided in this rule." According to respondent's argument, since petitioner did not "support" its motion with affidavits, summary judgment was improper in this case. But as we have already explained, a motion for summary judgment may be made pursuant to Rule 56 "with or without supporting affidavits." In cases like the instant one, where the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the "pleadings, depositions, answers to interrogatories, and admissions on file," designate "specific facts showing that there is a genuine issue for trial."

[7] We do not mean that the nonmoving party must produce evidence in a form that would be admissible at trial in order to avoid

summary judgment. Obviously, Rule 56 does not require the nonmoving party to depose her own witnesses. Rule 56(e) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves, and it is from this list that one would normally expect the nonmoving party to make the showing to which we have referred.

The Court of Appeals in this case felt itself constrained, however, by language in our decision in Adickes v. S.H. Kress & Co., 398 U.S. 144, 190 S.Ct. 1598, 26 L.Ed.2d 142 (1970). There we held that summary judgment had been improperly entered in favor of the defendant restaurant in an action brought under 42 U.S.C. Section 1983. In the course of its opinion, the Adickes Court said that "both the commentary on and the background of the 1963 amendment conclusively show that it

was not intended to modify the burden of the moving party...to show initially the absence of a genuine issue concerning any material fact." Id., at 159, 90 S.Ct., at 1609. We think that this statement is accurate in a literal sense, since we fully agree with the Adickes Court that the 1963 amendment to rule 56(e) was not designed to modify the burden of making the showing generally required by Rule 56(c). It also appears to us that, on the basis of the showing before the Court in Adickes, the motion for summary judgment in that case should have been denied. But we do not think the Adickes language quoted above should be construed to mean that the burden is on the party moving for summary judgment to produce evidence showing the absence of a genuine issue of material fact, even with respect to an issue on which the nonmoving party bears the burden of proof. Instead, as

we have explained, the burden on the moving party may be discharged by "showing"--that is, pointing out to the district court--that there is an absence of evidence to support the nonmoving party's case.

[8]The last two sentences of Rule 56(e) were added, as this Court indicated in Adickes, to disapprove a line of cases allowing a party opposing summary judgment to resist a properly made motion by reference only to its pleadings. While the Adickes Court was undoubtedly correct in concluding that these two sentences were not intended to reduce the burden of the moving party, it is also obvious that they were not adopted to add to that burden. Yet that is exactly the result which the reasoning of the Court of Appeals would produce; in effect, an amendment to Rule 56(e) designed to facilitate the granting of motions for summary judgment would

be interpreted to make it more difficult to grant such motions. Nothing in the two sentences themselves requires this result, for the reasons we have previously indicated, and we now put to rest any inference that they do so.

Our conclusion is bolstered by the fact that district courts are widely acknowledged to possess the power to enter summary judgments sua sponte, so long as the losing party was on notice that she had to come forward with all of her evidence. See 244 U.S.App.D.C., at 167-168, 756 F.2d at 189 (Bork, J., dissenting); 10A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure Section 2720, pp. 28-29 (1983). It would surely defy common sense to hold that the District Court could have entered summary judgment sua sponte in favor of petitioner in the instant case, but that petitioner's filing

of a motion requesting such a disposition precluded the District court from ordering it.

Respondent commenced this action in September 1980, and petitioner's motion was filed in September 1981. The parties had conducted discovery, and no serious claim can be made that respondent was in any sense "railroaded" by a premature motion for summary judgment. Any potential problem with such premature motions can be adequately dealt with under Rule 56(f),[6] which allows a summary judgment motion to be denied, or the hearing on the motion to be continued, if the nonmoving party has not had an opportunity to make full discovery.

In this Court, respondent's brief and oral argument have been devoted as much to the proposition that an adequate showing of exposure to petitioner's asbestos products was made as to the proposition that no such

showing should have been required. But the Court of Appeals declined to address either the adequacy of the showing made by respondent in opposition to petitioner's motion for summary judgment, or the question whether such a showing, if reduced to admissible evidence, would be sufficient to carry respondent's burden of proof at trial. We think the Court of Appeals with its superior knowledge of local law is better suited than we are to make these determinations in the first instance.

[9,10] The Federal Rules of Civil Procedure have for almost 50 years authorized motions for summary judgment upon proper showings of the lack of a genuine, triable issue of material fact. Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed "to secure the just,

speedy and inexpensive determination of every action." Fed.Rule Civ.Proc. 1; see Schwarzer, Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact, 99 F.R.D. 465, 467 (1984). Before the shift to "notice pleading" accomplished by the Federal Rules, motions to dismiss a complaint or to strike a defense were the principal tools by which factually insufficient claims or defenses could be isolated and prevented from going to trial with the attendant unwarranted consumption of public and private resources. But with the advent of "notice pleading," the motion to dismiss seldom fulfills this function any more, and its place has been taken by the motion for summary jdugment. Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses

tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.

The judgment of the Court of Appeals is accordingly reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice WHITE, concurring.

I agree that the Court of Appeals was wrong in holding that the moving defendant must always support his motion with evidence or affidavits showing the absence of a genuine dispute about a material fact. I also agree that the movant may rely on depositions, answers to interrogatories, and the like, to demonstrate that the plaintiff has no evidence to prove his case and hence that there can be

no factual dispute. But the movant must discharge the burden the Rules place upon him: It is not enough to move for summary judgment without supporting the motion in any way or with a conclusory assertion that the plaintiff has no evidence to prove his case.

A plaintiff need not initiate any discovery or reveal his witnesses or evidence unless required to do so under the discovery Rules or by court order. Of course, he must respond if required to do so; but he need not also depose his witnesses or obtain their affidavits to defeat a summary judgment motion asserting only that he has failed to produce any support for his case. It is the defendant's task to negate, if he can, the claimed basis for the suit.

Petitioner Celotex does not dispute that if respondent has named a witness to support her claim, summary judgmnet should not be

granted without Celotex somehow showing that the named witness' possible testimony raises no genuine issue of material fact. Tr. of Oral Arg. 43, 45. It asserts, however, that respondent has failed on request to produce any basis for her case. Respondent, on the other hand, does not contend that she was not obligated to reveal her witnesses and evidence but insists that she has revealed enough to defeat the motion for summary judgment. Because the Court of Appeals found it unnecessary to address this aspect of the case, I agree that the case should be remanded for further proceedings.

Justice BRENNAN, with whom THE CHIEF JUSTICE and Justice BLACKMUN join, dissenting.

This case requires the Court to determine whether Celotex satisfied its initial burden of production in moving for summary judgment on the ground that the plaintiff lacked

evidence to establish an essential element of her case at trial. I do not disagree with the Court's legal analysis. The Court clearly rejects the ruling of the Court of Appeals that the defendant must provide affirmative evidence disproving the plaintiff's case. Beyond this, however, the Court has not clearly explained what is required of a moving party seeking summary judgment on the ground that the nonmoving party cannot prove its case.[1] This lack of clarity is unfortunate: district courts must routinely decide summary judgment motions, and the Court's opinion will very likely create confusion. For this reason, even if I agreed with the Court's result, I would have written separately to explain more clearly the law in this area. However, because I believe that Celotex did not meet its burden of production under Federal Rule of Civil Procedure 56, I

respectfully dissent from the Court's judgment.

Summary judgment is appropriate where the Court is satisfied "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.Rul Civ.Proc. 56(c). The burden of establishing the nonexistence of a "genuine issue" is on the party moving for summary judgment. 10A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure Section 2727, p. 121 (2d ed. 1983) (hereinafter Wright) (citing cases); 6 J. Moore, W. Taggart & J. Wicker, Moore's Federal Practice Para. 56.15[3] (2d ed. 1985) (hereinafter Moore) (citing cases). See also, ante, at 2553; ante, at 2555 (WHITE, J., concurring). This burden has two distinct components: an initial burden of production, which shifts to the nonmoving party if

satisfied by the moving party. See 10A Wright, Miller & Kane Section 2727. The court need not decide whether the moving party has satisfied its ultimate burden of persuasion[2] unless and until the Court finds that the moving party has discharged its initial burden of production. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157-161, 90 S.Ct. 1598, 1608-1610, 26 L.Ed.2d 142 (1970); 1963 Advisory Committee's Notes on Fed.Rule Civ.Proc. 56(e), 28 U.S.C.App., p. 626.

The burden of production imposed by Rule 56 requires the moving party to make a prima facie showing that it is entitled to summary judgment. 10A Wright, Miller & Kane Section 2727. The manner in which this showing can be made depends upon which party will bear the burden of persuasion on the challenged claim at trial. If the moving party will bear the burden of persuasion at trial, that party must

support its motion for credible evidence--using any of the materials specified in Rule 56(c)--that would entitle it to a directed verdict if not controverted at trial. Ibid. Such an affirmative showing shifts the burden of production to the party opposing the motion and requires that party either to produce evidentiary materials that demonstrate the existence of a "genuine issue" for trial or to submit an affidavit requesting additional time for discovery. Ibid.; Fed.Rules Civ.Proc. 56(e), (f).

If the burden of persuasion at trial would be on the non-moving party, the party moving for summary judgmnet may satisfy Rule 56's burden of production in either of two ways. First, the moving party may submit affirmative evidence that negates an essential element of the non-moving party's claim. Second, the moving party may demonstrate to the Court that

the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim. See 10A Wright, Miller & Kane Section 2727, pp. 130-131; Louis, Federal Summary Judgment Doctrine: A Critical Analysis, 83 Yale L.J. 745, 750 (1974)(hereinafter Louis). If the nonmoving party cannot muster sufficient evidence to make out its claim, a trial would be useless and the moving party is entitled to summary judgment as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S.Ct. 2505, 2510-2511, 91 L.Ed.2d 202 (1986).

Where the moving party adopts this second option and seeks summary judgment on the ground that the nonmoving party--who will bear the burden of persuasion at trial--has no evidence, the mechanics of discharging Rule 56's burden of production are somewhat trickier. Plainly, a conclusory assertion

that the nonmoving party has no evidence is insufficient. See ante, at 2555 (WHITE, J., concurring). Such a "burden" of production is no burden at all and would simply permit summary judgment procedure to be converted into a tool for harassment. See Louis 750-751. Rather, as the Court confirms, a party who moves for summary judgment on the ground that the nonmoving party has no evidence must affirmatively show the absence of evidence in the record. Ante, at 2553. This may require the moving party to depose the nonmoving party's witnesses or to establish the inadequacy of documentary evidence. If there is literally no evidence in the record, the moving party may demonstrate this by reviewing for the court the admissions, interrogatories, and other exchanges between the parties that are in the record. Either way, however, the moving party must affirmatively demonstrate

that there is no evidence in the record to support a judgment for the nonmoving party.

If the moving party has not fully discharged this initial burden of production, its motion for summary judgment must be denied, and the Court need not consider whether the moving party has met its ultimate burden of persuasion. Accordingly, the nonmoving party may defeat a motion for summary judgment that asserts that the nonmoving party has no evidence by calling the Court's attention to supporting evidence already in the record that was overlooked or ignored by the moving party. In that event, the moving party must respond by making an attempt to demonstrate the inadequacy of this evidence, for it is only by attacking all the record evidence allegedly supporting the nonmoving party that a party seeking summary judgment satisfies Rule 56's burden of

production.[3] Thus, if the record disclosed that the moving party had overlooked a witness who would provide relevant testimony for the nonmoving party at trial, the Court could not find that the moving party had discharged its initial burden of production unless the moving party sought to demonstrate the inadequacy of this witness' testimony. Absent such a demonstration, summary judgment would have to be denied on the ground that the moving party had failed to meet its burden of production under Rule 56.

The result in Adickes v. S.H. Kress & Co., supra, is fully consistent with these principles. In that case, petitioner was refused service in respondent's lunchroom and then was arrested for vagracy by a local policeman as she left. Petitioner brought an action under 42 U.S.C. Section 1983 claiming that the refusal of service and subsequent

arrest were the product of a conspiracy between respondent and the police; as proof of this conspiracy, petitioner's complaint alleged that the arresting officer was in respondent's store at the time service was refused. Respondent subsequently moved for summary judgment on the ground that there was no actual evidence in the record from which a jury could draw an inference of conspiracy. In response, petitioner pointed to a statement from her own deposition and an unsworn statement by a Kress employee, both already in the record and both ignored by respondent, that the policeman who arrested petitioner was in the store at the time she was refused service. We agreed that "[i]f a policeman were present,...it would be open to a jury, in light of the sequence that followed, to infer from the circumstances that the policeman and Kress employee had a 'meeting of the minds'

and thus reached an understanding that petitioner should be refused service." 398 U.S., at 158, 90 S.Ct., at 1609. Consequently, we held that it was error to grant summary judgment "on the basis of this record" because respondent had "failed to fulfill its initial burden" of demonstrating that there was no evidence that there was a policeman in the store. Id., at 158-158, 90 S.Ct., at 1608-1609.

The opinion in Adickes has sometimes been read to hold that summary judgment was inappropriate because the respondent had not submitted affirmative evidence to negate the possibility that there was a policeman in the store. See Brief for Respondent 20, n. 30 (citing case). The Court of Appeals apparently read Adickes this way and therefore required Celotex to submit evidence establishing that plaintiff's decedent had not

been exposed to Celotex asbestos. I agree with the Court that this reading of Adickes was erroneous and that Celotex could seek summary judgment on the ground that plaintiff could not prove exposure to Celotex asbestos at trial. However, Celotex was still required to satisfy its initial burden of production.

II

I do not read the Court's opinion to say anything inconsistent with or different than the preceding discussion. My disagreement with the Court concerns the application of these principles to the facts of this case.

Defendant Celotex sought summary judgment on the ground that plaintiff had "failed to produce" any evidence that her decedent had ever been exposed to Celotex asbestos.[4] App. 170. Celotex supported this motion with a two-page "Statement of Material Facts as to Which There is No Genuine Issue" and a

three-page "Memorandum of Points and Authorities" which asserted that the plaintiff had failed to identify any evidence in responding to two sets of interrogatories propounded by Celotex and that therefore the record was "totally devoid" of evidence to support plaintiff's claim. See id., at 171-176.

Approximately three months earlier, Celotex had filed an essentially identical motion. Plaintiff responded to this earlier motion by producing three pieces of evidence which she claimed "[a]t the very least...demonstrate that there is a genuine factual dispute for trial," id., at 143: (1) a letter from an insurance representative of another defendant describing asbestos products to which plaintiff's decedent had been exposed, id., at 160; (2) a letter from T.R. Hoff, a former supervisor of decedent,

describing asbestos products to which decedent had been exposed, id., at 162; and (3) a copy of decedent's deposition from earlier workmen's compensation proceedings, id., at 164. Plaintiff also apparently indicated at that time that she intended to call Mr. Hoff as a witness at trial. Tr. of Oral ARg. 6-7, 27-29.

Celotex subsequently withdrew its first motion for summary judgment. See App. 167.[5] However, as a result of this motion, when Celotex filed its second summary judgment motion, the record did contain evidence--including at least one witness--supporting plaintiff's claim. Indeed, counsel for Celotex admitted to this Court at oral argument that Celotex was aware of this evidence and of plaintiff's intention to call Mr. Hoff as a witness at trial when the second summary judgment motion was filed.

Tr. of Oral Arg. 5-7. Moreover, plaintiff's response to Celotex' second motion pointed to this evidence--noting that it had already been provided to counsel for Celotex in connection with the first motion--and argued that Celotex had failed to "meet its burden of proving that there is no genuine factual dispute for trial." App. 188.

On these facts, there is simply no question that Celotex failed to discharge its initial burden of production. Having chosen to base its motion on the argument that there was no evidence in the record to support plaintiff's claim, Celotex was not free to ignore supporting evidence that the record clearly contained. Rather, Celotex was required, as an initial matter, to attack the adequacy of this evidence. Celotex' failure to fulfill this simple requirement constituted a failure to discharge its initial burden of

production under Rule 56, and thereby rendered summary judgment improper.[6]

This case is indistinguishable from Adickes. Here, as there, the defendant moved for summary judgment on the ground that the record contained no evidence to support an essential element of the plaintiff's claim. Here, as there, the plaintiff responded by drawing the court's attention to evidence that was already in the record and that had been ignored by the moving party. Consequently, here, as there, summary judgment should be denied on the ground that the moving party failed to satisfy its initial burden of production.[7]

Justice STEVENS, dissenting.

As the Court points out, ante, at 2551, petitioner's motion for summary judgment was based on the proposition that respondent could not prevail unless she proved that her

deceased husband had been exposed to petitioner's products "within the jurisdictional limits" of the District of Columbia.[1] Respondent made an adequate showing--albeit possibly not in admissible form[2]---that her husband had been exposed to petitioner's product in Illinois.[3] Although the basis of the motion and the argument had been the lack of exposure in the District of Columbia, the District Court stated at the end of the argument: "The Court will grant the defendant Celotex's motion for summary judgment there being no showing that the plaintiff was exposed to the defendat Celotex's product in the District of Columbia **or elsewhere** within the statutory period." App. 217 (emphasis added). The District Court offered no additional explanation and no written opinion. The Court of Appeals reversed on the basis that Celotex had not met

its burden; the court noted the incongruity of the District Court's opinion in the context of the motion and argument, but did not rest on that basis because of the "or elsewhere" language.[4]

Taken in the context of the motion for summary judgment on the basis of no exposure in the District of Columbia, the District Court's decision to grant summary judgment was palpably erroneous. The court's bench reference to "or elsewhere" neither validated that decision nor raised the complex question addressed by this Court today. In light of the District Court's plain error, therefore, it is perfectly clear that, even after this Court's abstract exercise in Rule construction, we should nonetheless affirm the reversal of summary judgment on that narrow ground.[5]

I respectfully dissent.

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Report of Decisions for the convenience of the reader. See United States v. Detroit Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

Footnotes in the Main Opinion

1 Since our grant of certiorari in this case, the Fifth Circuit has rendered a decision squarely rejecting the position adopted here by the District of Columbia Circuit. See Fontenot v. Upjohn co., 780 F.2d 1190 (1986).

2 Justice STEVENS, in dissent, argues that the District Court granted summary judgment only because respondent presented no evidence that the decedent was exposed to Celotex asbestos products in the District of Columbia. See post, at 2561. According to Justice STEVENS, we should affirm the decision of the Court of Appeals, reversing the District Court, on the "narrower ground" that respondent "made an adequate showing" that the decedent was exposed to Celotex asbestos products in Chicago during 1970-1971. See Ibid.

Justice STEVENS' position is factually incorrect. The District Court expressly stated that respondent had made no showing of exposure to Celotex asbestos products "in the District of Columbia or elsewhere." App. 217 (emphasis added). Unlike Justice STEVENS, we assume that the District Court meant what it said. The majority of the Court of Appeals addrssed the very issue raised by Justice

STEVENS, and decided that "[t]he District Court's grant of summary judgment must therefore have been based on its conclusion that there was 'no showing that the plaintiff was exposed to defendant Celotex's product in the District of Columbia or elsewhere within the statutory period.'" Catrett v. Johns-Manville Sales Corp., 244 U.S.App.D.C. 160, 162, n. 3, 756 F.2d 181, 183, n. 3 (1985)(emphasis in original). In other words, no judge involved in this case to date shares Justice STEVENS' view of the District Court's decision.

3 Rule 56(e) provides:

"Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers of parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and support as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

4. Rule 56(c) provides:

"The motion shall be served at least 10 days before the time fixed for the hearing.

The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

5 See Louis, Federal Summary Judgment Doctrine: A Critical Analysis, 83 Yale L.J. 745, 752 (1974); Currie, Thoughts on Directed Verdicts and Summary Judgments, 45 U.Chi.L.Rev. 72, 79 (1977).

6 Rule 56(f) provides:

"Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

Footnotes in Dissenting Opinion

1 It is also unclear what the Court of Appeals is supposed to do in this case on remand. Justice WHITE-who has provided the Court's fifth vote-plainly believes that the Court of Appeals should reevaluate whether the defendant met its initial burden of production. However, the decision to reverse

rather than to vacate the judgment below implies that the Court of Appeals should assume that Celotex has met its initial burden of production and ask only whether the plaintiff responded adequately, and, if so, whether the defendant has met its ultimate burden of persuasion that no genuine issue exists for trial. Absent some clearer express from the Court to the contrary, Justice WHITE's understanding would seem to be controlling. Cf. Marks v. United States, 430 U.S. 188, 193, 97 S.Ct. 990, 993, 51 L.Ed.2d 260 (1977).

2 The bruden of persuasion imposed on a moving party by Rule 56 is a stringent one. 6 Moore Para. 56.15[3], pp. 56-66; 10A Wright, miller & Kane Section 2727, p. 124. Summary judgment should not be granted unless it is clear that a trial is unnecessary, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S.Ct. 2505, 2514, 91 L.Ed.2d 202 (1986), and any doubt as to the existence of a genuine issue for trial should be resolved against the moving party, Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-159, 90 S.Ct. 1598, 1608-09, 26 L.Ed.2d 142 (1970). In determining whether a moving party has met its burden of persuasion, the court is obliged to take account of the entire setting of the case and must consider all papers of record as well as any materials prepared for the motion. 10A Wright, Miller & Kane, Section 2721, p. 44; see, e.g., Stepanischen v. Merchants Despatch Transporation Corp., 722 F.2d 922, 930 (CA1 1983); Higgenbotham v. Ochsner Foundation Hospital, 607 F.2d 653, 656 (CA5 1979). As explained by the Court of Appeals for the Third Circuit in In re Japanese Electronic Products Antitrust Litigation, 723 F.2d 238

(1983), re'vd on other grounds sub nom. Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986), "[i]f...there is any evidence in the record from any source from which a reasonable inference in the [nonmoving party's] favor may be drawn, the moving party simply cannot obtain a summary judgment...."723 F.2d, at 258.

3 Once the moving party has attacked whatever record evidence--if any--the nonmoving party purports to rely upon, the burden of production shifts to the nonmoving party, who must either (1) rehabilitiate the evidence attacked in the moving party's papers, (2) produce additional evidence showing the existence of a genuine issue for trial as provided in Rule 56(e), or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f). See 10A Wright, Miller & Kane Section 2727, pp. 138-143. Summary judgment should be granted if the nonmoving party fails to respond in one or more of these ways, or if, after the nonmoving party responds, the court determines that the moving party has met its ultimate burden of persuading the court that there is no genuine issue of material fact for trial. See, e.g., First National Bank of Arizona v. Cities Service Oc., 391 U.S. 253, 289, 88 S.Ct. 1575, 1592, 20 L.Ed.2d 569 (1968).

4 Justice STEVENS asserts that the District Court granted summary judgment on the ground that the plaintiff had failed to show exposure in the District of Columba. He contends that the judgment of the Court of Appeals reversing the District Court's judgment should be affirmed on the "narrow ground" that it was

"palpably erroneous" to grant summary judgment on this basis. Post, at 2561 (dissenting). The Court replies that what the District court said was that plaintiff had failed to show exposure in the District of Columbia "or elsewhere". Ante, at 2551, n. 2. In my view, it does not really matter which reading is correct in this case. For, contrary to Justice STEVENS' calim, deciding this case on the ground that Celotex failed to meet its burden of production under Rule 56 does not involve an "abstract exercise in Rule construction." Post, at 2561. (STEVENS, J., dissenting). To the contrary, the principles governing a movant's burden of proof are straight-forward and well established, and deciding the case on this basis does not require a new construction of Rule 56 at all; it simply entails applying established law to the particular facts of this case. The choice to reverse because of "palpable erro[r]" with respect to the burden of a moving party under Rule 56 is thus no more "abstract" than the choice to reverse because of such error with respect to the elemtns of a tort claim. Indeed, given that the issue of the moving party's burden under Rule 56 was the basis of the Court of Appeals' decision, the question upon which certiorari was granted, and the issue briefed by the parties and argued to the Court, it would seem to be the preferable ground for deciding the case.

5 Celotex apparently withdrew this motion because, contrary to the assertion made in the first summary judgment motion, its second set of interrogatories had not been served on the plaintiff

6 If the plaintiff had answered Celotex'

second set of interrogatories with the evidence in her response to the first summary judgment motion, and Celotex had ignored those interrogatories and based its second summary judgment motion on the first set of interrogatories only, Celotex obviously could not claim to have discharged its Rule 56 burden of production. This result should not be different simply because the evidence plaintiff relied upon to support her claim was acquired by Celotex other than in plaintiff's answers to interrogatories.

7 Although Justice WHITE agrees that "if [plaintiff] has named a witness to support her cliam summary judgment should not be granted without Celotex somehow showing that the named witness' possible testimony raises no genuine issue of material fact." he would remand "[b]ecaue the Court of Appeals found it unnecessary to address this asepct of the case." Ante, at 2555 (concurring). However, Celotex has admitted that plaintiff had disclosed her intent to call Mr. hoff as a witness at trial before Celotex filed its second motion for summary judgment. Tr. of Oral Arg. 6-7. Under the circumstances, then, remanding is a waste of time.

Footnotes in Stevens Dissenting Opinion

1 See Motion of Defendant Celotex Corporation for Summary Judgment, App. 170 ("Defendant Celotex Corporation, pursuant to Rule 56(b) of the Federal Rules of Civil Procedure moves this Court for an Order granting Summary Judgment on the ground that plaintiff has filaed to produce evidence that any product designed, manufactured or distributed by Celotex Corpration was the

proximate cause of the injuries allegd within the jurisdictional limits of this Court") (emphasis added); Memorandum of Points and Authorities in Support of Motion of Defendant Celotex Corporation for Summary Judgment, id., at 175 (Plaintiff "must demonstrate some link between a Celotex Corporation product claimed to be the caue of the decedent's illness and the decedent himself. The record is totally devoid of any such evidence within the jurisdictional confines of this Court") (emphasis added); Transcript of Argument in Support of Motion of Defendant Celotex Corporation for Summary Judgment, id., at 211 ("Our position is...there has been no product identification of any Celotex products...that have been used in the District of Columbia to which the decedent was exposed")(emphasis added).

2 But cf. ante, at 2553 ("We do not mean that the nonmoving party must produce evidence in a form that would be admissible at trial in order to avoid summary judgment").

3 See App. 160 (letter from Aetna Life Insurance Co.)(referring to the "asbestos that Mr. Catrett came into contact with while working for Anning-Johnson Company" and noting that the "manufacturer of this product" wa spurchased by Celotex); id., at 162 (letter from Anning-Johnson Co.)(confirming that Catrett worked for the company and supervised the installation of asbestos produced by the company that Celotex ultimately purchased); id, at 164, 164c (deposition of Catrett)(description of his work with asbestos "in Chicago").

4 See Catrett v. Johns-Manville Sales Corp.,

756 F.2d 181, 185, n. 14 (1985)("[T]he discussion at the time the motion was granted actually spoke to venue. It was only the phrase 'or elsewhere', appearing with no prior discussion, in the judge's oral ruling at the close of argument that made the grant of summary judgment even conceivably proper").

5 Cf. n. 2, supra, The Court's statement that the case should be remanded because the Court of Appeals has a "superior knowledge of local law", ante, at 2555, is bewildering because there is no question of local law to be decided. Cf. Bishop v. Wood, 426 U.S. 341, 345-347, 96 S.Ct. 2074, 2077-2079, 48 L.Ed.2d 684 (1976).

The Court's decision to remand when a sufficient ground for affirmance is available does reveal, however, the Court's increasing tendency to adopt a presumption of reversal. See, e.g., New York v. P.J. Video,Inc., 475 U.S. 868, 885, 106 S.Ct. 1610, 1619, 89 L.Ed.2d 871 (1986) (MARSHALL, J., dissenting); Icicle Seafoods, Inc., v. Worthington, 475 U.S. 709, 715, 106 S.Ct. 1527, 1530, 89 L.Ed2d 739 (1986) (STEVENS, J., dissenting); City of Los Angeles v. Heller, 475 U.S. 796, 800, 1106 S.Ct. 1571, 1573, 89 L.Ed.2d 806 (1986) (STEVENS, J., dissenting); Pennsylvania v. Goldhammer, 474 U.S. 28, 31, 106 S.Ct. 353, 88 L.Ed.2d 183 (1985)(STEVENS, J., dissenting). As a matter of efficient judicial administration and of respect for the state and federal courts, I believe the presumption should be precisely the opposite.

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No. 92-1554

In The

Supreme Court of the United States

October Term, 1992

CAROL JESSEN HINTZ, ET AL.,

Petitioner,

vs.

PARK COUNTY, MONTANA, ET AL.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

ALLEN P. LANNING
Counsel of Record
L. D. NYBO
CONKLIN, NYBO, LEVEQUE & MURPHY, P.C.
#9 3rd St. N., Ste. 203
P. O. Box 2049
Great Falls, MT 59403-2049
(406) 727-9270
Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

1. Is there a presumption against suicide in federal civil cases creating a genuine issue of fact as to whether John Hintz shot himself, and precluding summary judgment?

2. Was John Hintz, at the time he shot himself, in custody, justifying the imposition of liability under Section 1983 and the Due Process Clause of the Fourteenth Amendment for gross negligence in failing to prevent his suicide?

3. May a federal district court dismiss pendent state law claims remaining after all federal claims have been dismissed?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 6

ARGUMENT 7

I. Petitioner Misstates Facts Critical To This Court's Consideration Of The Petition 7

II. Certiorari Should Not Be Granted Because The Ninth Circuit Has Not Decided A Federal Question In Conflict With This Court's Precedent 9

III. The Lower Court Did Not Err In Granting Summary Judgment For Defendants On Petitioner's Section 1983 Claim 11

A. There Is No Presumption Against Suicide Constituting Affirmative Evidence In Federal Civil Actions 12

B. A Passenger In A Moving Vehicle With An Avenue Of Escape Is Not In The Custody Of Law Enforcement Officers, For The Purpose Of Imposing Liability On The Officers For Failing To Prevent His Suicide .. 14

IV. The District Court's Grant Of Summary Judgment Was Not Such A Departure From The Accepted And Usual Course Of Judicial Proceedings As To Call For An Exercise Of This Court's Power Of Supervision 16

V. The Appellate Court Properly Affirmed The District Court's Denial Of Petitioner's Pendent State Claims 17

CONCLUSION 18

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 91 L.Ed.2d 202, 106 S.Ct. 2505 (1986) 9

Baker v. McCollan, 443 U.S. 137, 61 L.Ed.2d 433, 99 S.Ct. 2689 (1979) 11

Berkemer v. McCarty, 468 U.S. 420, 82 L.Ed.2d 317, 104 S.Ct. 3138 (1984) 15

California v Beheller, 463 U.S. 1121, 77 L.Ed.2d 1275, 103 S.Ct. 3517 (1983) 15

Celotex Corp. v. Catrett, 477 U.S. 317, 91 L.Ed.2d 265, 106 S.Ct. 2548 (1986) 9

Daniels v. Williams, 474 U.S. 327, 88 L.Ed.2d 662, 106 S.Ct. 662 (1986) 11, 12

DeShaney v. Winnebago County Social Services Department, 489 U.S. 189, 103 L.Ed.2d 249, 109 S.Ct. 998 (1989) 14

Dick v. New York Life Ins. Co., 359 U.S. 437, 3 L.Ed.2d 935, 79 S.Ct. 921 (1959) 10, 12, 13

Lipscomb v. Simmons, 884 F.2d 1242 (9th Cir. 1989) 14

Oklahoma City v. Tuttle, 471 U.S. 808, 85 L.Ed.2d 791, 105 S.Ct. 2427 (1985) 11

Parratt v. Taylor, 451 U.S. 527, 68 L.Ed.2d 420, 101 S.Ct. 1908 (1981) 11

Strandberg v. City of Helena, 791 F.2d 744 (9th Cir. 1986) 14

United Mine Workers of America v. Gibbs, 383 U.S. 715, 16 L.Ed.2d 218, 86 S.Ct. 1130 (1966) 17

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS AND RULES

Amendment XIV, Federal Constitution..... *passim*

Rule 56(c), Fed.R.Civ.P. 9

Rule 10(a), Rev. Rules, S.Ct..... 7, 16

Rule 10(c), Rev. Rules, S.Ct..... 6, 9

42 U.S.C. 1983, *et seq*..... *passim*

TEXTUAL AUTHORITIES

Black's Law Dictionary, p. 347 (5th Ed. 1979)..... 15

Webster's New Collegiate Dictionary, p. 280 (1973)..... 15

STATEMENT OF THE CASE

John Hintz, a chronic alcoholic, became threatening and abusive toward his wife Carol, who had filed for divorce. (Deposition of Carol Jessen, pp. 26, 30-31.) In July, 1986, at Carol's urgent request, a temporary restraining order and a contempt warrant naming John Hintz were issued by the Park County Justice of the Peace. (Affidavit of Park County Justice of the Peace Deanna Egeland, attached to Defendants' Brief in Support of Motion for Summary Judgment.) Carol made arrangements to meet the deputies at her house and let them in as John had hidden from the officers earlier in the day. (Deposition of Brad Wilson, Exhibit 1.)

On the way to the scene, two Livingston deputies encountered the Clyde Park deputy. When the three arrived at the house to serve the arrest warrant and temporary restraining order, Carol advised the deputies that John, who had been drinking, had just left with Wade Sarrazin. She gave them a description of Sarrazin's truck and advised them of John's probable destination. (Deposition of Brad Wilson, pp. 14-15, Deposition of Carol Jessen, p. 40.) Earlier that evening John Hintz showed Sarrazin a sawed-off .410 shotgun Hintz had made. Hintz took that weapon and two .410 shells with him when he and Sarrazin went to buy beer that evening. (Deposition of Wade Sarrazin, Exhibit 1, p. 2.)

Shortly after 10:00 P.M., one deputy located the Sarrazin vehicle and followed it while two deputies in another car parked on the road leading to the Hintz residence. The deputies' car blocked about half of the

roadway. (Deposition of Brad Wilson, pp. 14-17; Deposition of Lee Roy Keto, pp. 11-14; Deposition of Hank Tashjian, p. 12.) When Hintz noticed that the Sarrazin vehicle was being followed by a law enforcement officer, he reached up and removed the sawed-off .410 shotgun from the gun rack in the truck. (Deposition of Wade Sarrazin, Exhibit 1, pp. 1-4.) When Sarrazin turned onto the road leading to the residence, deputies in both vehicles turned on their revolving lights. (Deposition of Brad Wilson, p. 18; Deposition of Lee Roy Keto, p. 15; Deposition of Hank Tashjian, pp. 12-13.) Deputies Wilson and Keto heard the shot, and Wilson saw the flash of the gun firing inside the truck. (Deposition of Lee Roy Keto, pp. 18-21; Deposition of Brad Wilson, pp. 21-25.) Immediately after the shot and before the truck stopped, the shotgun came out of Hintz's window. (Deposition of Hank Tashjian, pp. 15-16.) Sarrazin then stopped the truck and Hintz opened his door and collapsed upon the road. When Wilson approached Hintz, the latter was already lying or crouching on the ground, wounded. (Deposition of Hank Tashjian, pp. 17-19.) First the deputies and then arriving medical personnel administered first aid to Hintz. Hintz was transported to the Livingston Memorial Hospital, where he was pronounced dead at 11:43 P.M. (Deposition of Brad Wilson, pp. 30-35.)

Undersheriff Frawley recovered the sawed-off .410 shotgun, one .410 shell, and one used .410 shell casing from the scene. (Deposition of Dennis Frawley, p. 26.) That evening, Undersheriff Frawley took a statement from Wade Sarrazin. In that statement, Wade testified Hintz shot himself with a sawed-off .410 while the vehicle was still moving:

[Sarrazin]: And I said well do you want me to turn or just keep goin, he said turn I said there is another cop car there on the right then the lights come on.

[Frawley]: What lights?

[Sarrazin]: The other police car lights.

[Frawley]: Okay.

[Sarrazin]: And then he said ah – he said he, well then he said speed up again so I speeded a little again, so then when I started slowin down to turn I said shit there's another cop there and then he said, he said "goodbye John," he said "goodbye, Wade. I love you," and that's the last, then he shot it.

. . .

[Frawley]: Okay. Ah he shot himself? Ah how did it have [sic], were you stopped or what?

[Sarrazin]: No, we weren't stopped. I didn't even know he had the, I knew he had the gun but I didn't, he just said goodbye John, goodbye Wade, and then bang.

[Frawley]: Okay and this happened while the vehicle was still moving?

[Sarrazin]: Yes.

. . .

[Frawley]: Okay. Did you see the officers at any time fire their weapons or do anything like that?

[Sarrazin]: *No, the officers never fired their weapons*. [Emphasis supplied.]

. . .

[Frawley]: Ah, let's run through that shooting part a little bit. Ah, he shot himself while the vehicle was still moving, correct?

[Sarrazin]: Yes.

[Frawley]: He shot himself in the vehicle?

[Sarrazin]: Yes.

[Frawley]: And did you see where he shot himself?

[Sarrazin]: No, I didn't even know he, I just heard the shot and then I see, I looked over and he had the gun just like this.

[Frawley]: Well describe what you were showing to me.

[Sarrazin]: He had one hand on the trigger and one hand on the lower part of the barrel.

[Frawley]: And where was the gun pointing?

[Sarrazin]: At, looked like right at his chest, I couldn't really see and

[Frawley]: You saw that right after the gun shot?

[Sarrazin]: I saw that, I saw that be, I didn't really, before the gunshot.

[Frawley]: Okay, you kinda just glanced over at him and saw this?

[Sarrazin]: Yeah I just kinda glanced over and then bang and he just

[Frawley]: Okay. What happened to the shotgun after the shooting? Do you

> [Sarrazin]: I don't have any idea.
>
> [Frawley]: You don't have any idea. Was his window rolled down?
>
> [Sarrazin]: Ah, it was open about, oh probably eight, ten inches. (Deposition, Exhibit 1, Wade Sarrazin, pp. 4-5.)

In his deposition taken on June 7, 1990, Sarrazin stated:

> Q. Okay. But there is no doubt in your mind that he did shoot himself?
>
> A. No.
>
> Q. And you saw it?
>
> A. Yeah. (Deposition of Wade Sarrazin, p. 7.)

Petitioner claims that the death of John Hintz was caused by the policies of Park County, Montana, and the conduct of Robert Oakland, Dennis Frawley, Lee Roy Keto, Brad Wilson, and Hank Tashjian. Petitioner brought this action for alleged deprivations of John Hintz's civil rights in violation of the Federal Constitution and 42 U.S.C. 1983, *et seq*. She also alleged claims under Montana law for assault and battery, intentional infliction of emotional distress, and negligence.

Defendants moved for summary judgment arguing that the facts showed that Hintz committed suicide, and that Hintz was not in the custody of the Park County Sheriff's deputies when he committed suicide. The district court granted the defendants' motion for summary judgment. The Court issued a Memorandum and Order and judgment was entered. Hintz filed a Motion to Reconsider. The district court heard oral argument on the Motion to Reconsider and denied the same.

Hintz filed a notice of appeal with the Ninth Circuit Court of Appeals. The Ninth Circuit heard oral argument on September 18, 1992, and issued its order affirming the district court. Hintz's Petition for Rehearing was denied.

SUMMARY OF ARGUMENT

The petitioner has misstated the single most determinative fact. Whereas petitioner asserts that there is absolutely no testimony in the record that Hintz shot himself, the record below unequivocally demonstrates that Hintz did shoot himself. Petitioner also misstates fact in asserting that Sarrazin's vehicle could not have avoided the deputies and that there were 3 to 5 police cars serving a justice court warrant. The record indicates that Sarrazin could have avoided the deputies and that there were only two law enforcement vehicles involved in the stop.

This Court should not grant a writ of certiorari pursuant to Rule 10(c), Rev. Rules, S.Ct., because the Ninth Circuit Court of Appeals has not decided a federal question in a way that conflicts with applicable decisions of this Court. Neither the district court nor the court of appeals has annunciated a standard for summary judgment different from the standards set forth in decisions of this Court. The petitioner's claim that summary judgment was not appropriate under the facts of this case does not give rise to a federal question.

Ultimately, summary judgment was appropriate in this case because of the absence of a genuine issue of

material fact. There is no evidence in the record to support petitioner's claim that one of the law enforcement officers shot Hintz. Hintz shot himself. There is no presumption against suicide applicable in Section 1983 actions which would create an issue of fact. There is no evidence in the record to support petitioner's claim that Hintz was in custody when he shot himself. Hintz was in a moving vehicle with an avenue of escape at the moment he shot himself.

This Court should not grant a writ of certiorari pursuant to Rule 10(a), Rev. Rules, S.Ct., because the district court's grant of summary judgment, based upon a fair assessment of the record, is not such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Given that summary judgment was properly entered on the federal claims, the district court did not abuse its discretion in dismissing Hintz's pendent state law claims.

ARGUMENT

I. Petitioner Misstates Facts Critical To This Court's Consideration Of The Petition.

Petitioner contends that "there is absolutely no testimony in the record that Hintz shot himself." (Petition, p. 9). To the contrary, all of the witnesses, including Wade Sarrazin, said that John Hintz shot himself. The district court's careful consideration of the record revealed:

> [P]laintiff was not present at the time of Hintz' death. All of the witnesses who were present have disputed plaintiff's theory that one of the

> defendants intentionally shot Hintz. Most significantly, Wade Sarrazin, Hintz's friend and the driver of the pickup truck in which Hintz was riding, contradicts plaintiff's allegations. Sarrazin testified in his deposition that there was no real "inkling of evidence" in his mind that somebody else shot Hintz, and that there was no doubt in his mind that Hintz shot himself. This testimony was given after Sarrazin had reviewed and verified the essential accuracy of a statement given by him to authorities early in the morning of July 12, 1986, wherein he described the manner in which he saw Hintz hold the shotgun, point it at his chest, say "good-bye, Wade, I love you", and shoot himself. Sarrazin further stated that "the officers never fired their weapons."

(Pet. App. A., pp. 33-34).

Petitioner also asserts that Sarrazin's vehicle could not have avoided the deputies. (Petition, pp. 18-19). However, Hintz apparently decided to shoot himself while Sarrazin was slowing down to turn onto the dirt road. At that point, Sarrazin could have avoided the deputies by continuing to drive on the main road, or by passing them on the dirt road. Petitioner also asserts that there were three to five police cars attempting to serve a justice court warrant on Hintz. (Petition, p. 19). There were two law enforcement vehicles, one driven by Deputy Tashjian and one driven by Deputy Wilson, with Deputy Keto as a passenger.

II. Certiorari Should Not Be Granted Because The Ninth Circuit Has Not Decided A Federal Question In Conflict With This Court's Precedent.

Rule 10(c), Rev. Rules, S.Ct., indicates the character of reasons that will be considered in a review of a petition for writ of certiorari. The rule states, in relevant part, that certiorari may be granted:

> Where . . . a United States Court of Appeals . . . has decided a federal question in a way that conflicts with applicable decisions of this Court.

Here, the petitioner cannot show a conflict between this Court's precedent and the lower court decisions. In construing the standards for granting summary judgment, this Court has held that summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Rule 56(c), Fed.R.Civ.P.; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 91 L.Ed.2d 202, 106 S.Ct. 2505 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 91 L.Ed.2d 265, 106 S.Ct. 2548 (1986).

Neither the district court nor the Ninth Circuit annunciated a *standard* whereby summary judgment may be granted notwithstanding the existence of a genuine issue of material fact. Petitioner merely claims that the lower courts erred in determining that there were no genuine issues of material fact. (Petition, p. 24). Thus, it is clear that the court of appeals did not decide a federal

question in a way which conflicts with this Court's precedent. Petitioner simply seeks a second review of an adverse decision.

However, not every litigant unhappy with a district court's grant of summary judgment is entitled to a review by this Court. *See Dick v. New York Life Ins. Co.*, 359 U.S. 437, 452, 3 L.Ed.2d 935, 945, 79 S.Ct. 921, 930 (1959) (Frankfurter, J., dissenting), wherein Justice Frankfurter, quoting Chief Justice Taft, pointed out:

> "No litigant is entitled to more than two chances, namely, to the original trial and to a review, and the intermediate courts of review are provided for that purpose. When a case goes beyond that, it is not primarily to preserve the rights of the litigants. The Supreme Court's function is for the purpose of expounding and stabilizing principles of law for the benefit of the people of the country, passing upon constitutional questions and other important questions of law for the public benefit. It is to preserve uniformity of decision among the intermediate courts of appeal."

The issues raised by petitioner are not matters of large public concern, but are matters of lesser concern, without especial general interest, set forth only because she wants to have the court of last resort pass upon her right. *Id.* at 453, 3 L.Ed.2d at 945, 79 S.Ct. at 930. As such, they are not deserving of the time and attention and energy of this Court, and the petition for certiorari should be denied.

III. The Lower Court Did Not Err In Granting Summary Judgment For Defendants On Petitioner's Section 1983 Claim.

Petitioner alleged a claim under 42 U.S.C. § 1983 for violation of the civil rights of John Hintz. Section 1983 does not create any substantive rights. Instead, Section 1983 "merely provides remedies for deprivations of rights established elsewhere." *Oklahoma City v. Tuttle*, 471 U.S. 808, 816, 85 L.Ed.2d 791, 800, 105 S.Ct. 2427, 2432 (1985) (citing *Baker v. McCollan*, 443 U.S. 137, 140, 144, note 3, 61 L.Ed.2d 433, 439, 441, n. 3, 99 S.Ct. 2689, 2692, 2694, n. 3 (1979)). 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

To maintain a claim under Section 1983, petitioner must show that: (1) The County and officers acted under color of state law; and (2) that their action subjected John Hintz to the deprivation of rights, privileges, or immunities secured by the Constitution and laws of the United States. *Parratt v. Taylor*, 451 U.S. 527, 535, 68 L.Ed.2d 420, 428, 101 S.Ct. 1908, 1913 (1981) (overruled on other grounds, *Daniels v. Williams*, 474 U.S. 327, 88 L.Ed.2d 662, 106 S.Ct. 662 (1986)).

Petitioner alleges that the County and officers deprived John Hintz of his civil rights by causing his death, either negligently, grossly negligently, or through the unjustified use of arbitrary and excessive force. Mere negligence is not actionable under Section 1983. *Daniels v. Williams*, 474 U.S. 327, 332, 88 L.Ed.2d 662, 668, 106 S.Ct. 662, 665 (1986). Accordingly, petitioner's Section 1983 claim must rest upon the allegations that the County and officers caused John Hintz's death through gross negligence or the unjustified use of arbitrary and excessive force.

A. There Is No Presumption Against Suicide Constituting Affirmative Evidence In Federal Civil Actions.

Petitioner's Section 1983 claim, insofar as it attempts to impose liability for the unjustified use of arbitrary and excessive force, is based upon the allegation that one of the deputies, presumably Brad Wilson, shot John Hintz. However, the direct and uncontradicted evidence is that Hintz committed suicide. To avoid summary judgment, petitioner asserts the existence of a presumption against suicide which constitutes affirmative evidence creating a genuine issue of material fact as to whether Hintz committed suicide. Petitioner relies upon *Dick v. New York Life Ins. Co.*, 359 U.S. 437, 3 L.Ed.2d 935, 79 S.Ct. 921 (1959). (Petition, pp. 23-24).

Dick does not provide authority for petitioner's assertion. In *Dick*, this Court merely recognized that under North Dakota law, a presumption that death was accidental has the weight of affirmative evidence. The

presumption arises in insurance coverage cases where death occurred by gunshot wound. This Court held that the presumption would be applied by federal courts in diversity jurisdiction actions involving North Dakota law.

North Dakota law does not apply to petitioner's Section 1983 claim. Neither federal statutory law nor federal common law recognizes a "presumption against suicide" in Section 1983 actions. There is no compelling reason for this Court to adopt such a presumption. The North Dakota presumption discussed in *Dick* applies only to insurance cases where the insurer seeks to deny or reduce its liability by asserting that the insured committed suicide.

Moreover, a presumption of accidental death would be meaningless in the present case since petitioner claims, not that Hintz accidentally shot himself, but that he was shot by law enforcement officers. Finally, the circumstances surrounding Hintz's death are not unknown or unclear. There were four witnesses to the circumstances of Hintz's death, one a friend of Hintz, who all testified that he shot himself and that he was not shot by a law enforcement officer.

There is no presumption against suicide in Section 1983 actions. The lower courts did not err in refusing to apply such a presumption, and there is no compelling reason for this Court to recognize the presumption advocated by petitioner.

B. A Passenger In A Moving Vehicle With An Avenue Of Escape Is Not In The Custody Of Law Enforcement Officers, For The Purpose Of Imposing Liability On The Officers For Failing To Prevent His Suicide.

Petitioner's Section 1983 claim, insofar as it seeks to impose liability for gross negligence, appears to be based on the officers' failure to prevent Hintz's suicide. This Court has stated that "when the state takes a person into its custody . . . the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well being." *DeShaney v. Winnebago County Social Services Department*, 489 U.S. 189, 199-200, 103 L.Ed.2d 249, 261, 109 S.Ct. 998, 1005 (1989). *See also Lipscomb v. Simmons*, 884 F.2d 1242, 1246 (9th Cir. 1989) (holding that when an individual has a special relationship with the state, such as a custodial relationship, the state assumes an affirmative obligation to secure that individual's constitutional liberty). By alleging that the County and officers caused John Hintz's death through gross negligence, Hintz is apparently attempting to invoke the substantive due process protections afforded to those who have a special relationship with the state, such as a custodial relationship. Although this Court has never recognized this relationship as creating liability for failure to prevent suicide, some courts appear to have relied on this relationship in recognizing a cause of action for failure to prevent a suicide based upon willful and wanton negligence. *See Strandberg v. City of Helena*, 791 F.2d 744, 749 (9th Cir. 1986).

A determination of whether the Due Process Clause imposes an affirmative duty on the State to prevent the

suicide of those in its custody need not be made in the present case. The facts clearly illustrate that Hintz was not in the custody of the officers when he shot himself. Custody, by definition, denotes immediate physical control over a person. *Black's Law Dictionary*, p. 347 (5th Ed. 1979); *Webster's New Collegiate Dictionary*, p. 280 (1973). This Court's decisions indicate that even detainer of the person is not sufficient to render a person in custody; rather, the person's freedom of action must be curtailed to a degree associated with formal arrest. *Berkemer v. McCarty*, 468 U.S. 420, 82 L.Ed.2d 317, 104 S.Ct. 3138 (1984); *California v Beheller*, 463 U.S. 1121, 1125, 77 L.Ed.2d 1275, 1279, 103 S.Ct. 3517, 3520 (1983).

At the time of his suicide, Hintz was not incarcerated or even being held by the officers. The testimony of Sarrazin indicates that Hintz determined to shoot himself while Sarrazin's vehicle was still on the paved road. While the exact location of Sarrazin's truck at the time Hintz shot himself is not ascertainable, it is known that Sarrazin's truck was still moving, and could have continued down the dirt road past the Wilson and Keto vehicle. Accordingly, even if this Court were to recognize a cause of action under Section 1983 for failure to prevent the suicide of a person in the custody of the state, the facts do not support such a cause of action in this case.

Petitioner argues, without supporting authority, and contrary to the facts, that when a person has no avenue of escape from law enforcement officials, the person, even if in a moving vehicle, is "in custody", and liability may be imposed under Section 1983 for failure to prevent his suicide. The court of appeals' rejection of this argument made good sense and good policy. The officers had no

control over Hintz or his actions when he committed suicide. They could not have prevented his suicide. They had not yet had a chance to relieve Hintz of his gun or any other possible instrument of suicide. It would serve no purpose to impose liability upon law enforcement officers for failing to prevent an action when it was not within their power to do so.

IV. The District Court's Grant Of Summary Judgment Was Not Such A Departure From The Accepted And Usual Course Of Judicial Proceedings As To Call For An Exercise Of This Court's Power Of Supervision.

In granting summary judgment, the district court declined petitioner's request to create new legal principles. To avoid summary judgment, petitioner would have had the district court adopt a presumption against suicide recognized by some states in insurance coverage actions and apply it to all federal civil actions. She also would have had the district court expand the meaning of the term "in custody" to include persons who may shortly be detained but still retain almost unlimited personal freedom of action. The district court's refusal to recognize the new legal principles propounded by petitioner was not such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision pursuant to Rule 10(a), Rev. Rules, S.Ct.

V. The Appellate Court Properly Affirmed The District Court's Denial Of Petitioner's Pendent State Claims.

Petitioner has presented the question of whether the appellate court misapplied *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 16 L.Ed.2d 218, 86 S.Ct. 1130 (1966), in ruling that the trial court had the discretion to dismiss all claims. (Petition, p. iii). The district court held:

> [S]ince the federal claims are resolved prior to trial, this Court has a "powerful reason" to decline to exercise jurisdiction over the plaintiff's pendent state claims. *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966); *Carnegie-Mellon University v. Cohill*, 108 S.Ct. 614, 619 (1988). The Court finds that dismissal of the pendent claims is appropriate here, after consideration of the relevant factors. *Carnegie-Mellon*, 108 S.Ct. at 619 n.7.

As the appellate court recognized, the district court properly exercised its discretion pursuant to this Court's precedent in dismissing the pendent claims. In the absence of a more specific objection to the district court's dismissal of the claims, this Court should decline to review this issue.

CONCLUSION

For the reasons presented above, the petition for writ of certiorari should be denied.

Respectfully submitted,

ALLEN P. LANNING
Counsel of Record
L. D. NYBO
CONKLIN, NYBO, LEVEQUE & MURPHY, P.C.
#9 3rd St. N., Ste. 203
P. O. Box 2049
Great Falls, MT 59403-2049
(406) 727-9270
Attorneys for Respondents

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